



ACQUISITION

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, DC 20301-3000

March 3, 1993

DP (DAR)

MEMORANDUM FOR SHIRLEY CURRY, OASD(PA) (DFOI & SR)

SUBJECT: DAR Case 91-054, Joint Ventures

Public comments received on the subject proposed rule are attached for the public's review or request for copies. The rule involves revisions to DFARS Parts 219 and 252.219, and was published in the Federal Register on December 1, 1992 (57 FR 56895).

Our case manager is Mrs. Alyce Sullivan, (703) 697-7266.

Claudia Naugle
Deputy Director,
Defense Acquisition
Regulations Council

Attachments

91-054, Joint Ventures, Public Comment
Letters

Received in response to December 1, 1992 proposed rule (57 FR 56895)
Comment period was extended to January 31, 1993 (57 FR 60503)

1. DoDIG
2. AGE marketing Co.
3. Boise Cascade
4. Haas & Najarian
5. Phoenix Petroleum Co.
6. Howell Petroleum Products Inc.
7. Alexander-Allen, Inc
8. Allied Petro Inc.
9. Doyle & Bachman
10. Steptoe & Johnson
11. Las Energy Corporation (January 29, 1993)
12. Las Energy Corporation (December 29, 1992)
13. Reid & Priest
14. Congress of the United States
15. The Navajo Nation
16. Defense Logistics Agency, Defense Fuel Supply Center
17. Aerospace Industries Association

91-54-1



Audit Policy
and Oversight

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884



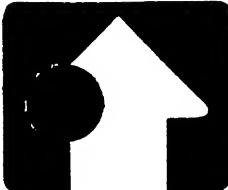
DEC 17 1992

MEMORANDUM FOR DIRECTOR, DEFENSE ACQUISITION REGULATIONS COUNCIL

SUBJECT: Defense Acquisition Regulation Case 91-54

The Office of the Inspector General, Department of Defense, does not wish to comment on Defense Acquisition Regulatory Case 91-54, Joint Ventures. We appreciate the opportunity to review the case.

Donald E. Davis
Deputy Assistant Inspector General
for Audit Policy and Oversight



AGE MARKETING CO.

5440 HARVEST HILL, #250
DALLAS, TEXAS 75230
(214) 458-7333
FAX: (214) 458-7222

December 17, 1992

The Defense Acquisition Regulations Council
ATTN: IMD 3D139
OUSD(A)
3062 Defense Pentagon
Washington, D. C. 20301-3062

RE: DAR Case 91-54

Gentlemen:

We have a recently published issue of the Federal Register, Vol. 57, No. 231, dated Tuesday, December 1, 1992. In this issue under "Proposed Rules" we see that the Department of Defense, Defense Acquisition Regulations Council, is proposing changes to the Defense FAR Supplement 48 CFR, to amend Parts 219 and 252 to incorporate DoD policy on eligibility of joint ventures including small disadvantaged businesses for small disadvantaged business evaluation and award preferences.

As a small disadvantaged business owner, we oppose this proposed amendment/change.

Historically there are enough lawsuits to reference to prove that this proposed change has already been tried by various other governmental agencies both on the national and local level and it simply opens the bidding and awarding process up to fraudulent representations. The end result is more harm than good to minority small disadvantaged firms who are trying to work within the guidelines of the system that are already in place.

By allowing a joint venture between a "small" business and a small disadvantaged business you are diluting the empowerment of the very businesses the regulations were originally established to assist, i.e., the small disadvantaged business. The proposed change would create another category and even more competition for the average small disadvantaged business. The majority of small disadvantaged businesses will not be able to find a legitimate joint venture partner and finally the competition becomes so overwhelming and cumbersome that the "small disadvantaged business" is

The Defense Acquisition Regulations Council

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literally "squeezed out". If this proposed change is allowed to happen what we wind up with is small businesses fronting as "small disadvantaged" businesses. Historically this has already happened and the instances have been exposed in local newspapers and on national TV by 60 Minutes. Additionally, I am sure there are many legal cases still pending investigation.

Again we oppose this change as it allows more fraud and little assistance to the small disadvantaged business in America.

Sincerely,



Al Gonzalez
President

AG:rae

cc: The Director
Office Secretary of Defense
Small & Small Disadvantaged
Business Utilization Office
Pentagon - Room 2A340
Washington D.C. 20301-3061

The Director
Small Business Administration
Dir. of Program Certification &
Eligibility
409 - Third Street S. W., 8th Floor
Washington D.C. 20416

The Honorable Dick Chaney
Secretary of Defense
1000 Defense Pentagon
Washington, D. C. 20301-1000

National Hispanic Chamber of Commerce
2000 "M" Street, N. W., Suite #860
Washington, D.C. 20036

The Defense Acquisition Regulations Council
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President-Elect Bill Clinton
The White House
Washington, D.C.

Federal Communications Commission.
 Michael C. Eager,
 Chief, Allocations Branch, Policy and Rules
 Division, Mass Media Bureau.
 [FRC Doc. 92-28998 Filed 11-30-92; 8:45 am]
 BILLING CODE 0710-01-01

DEPARTMENT OF DEFENSE

48 CFR Parts 219 and 252

Defense Federal Acquisition Regulation Supplement; Joint Ventures

AGENCY: Department of Defense (DoD).
ACTION: Proposed rule with request for
 public comments.

SUMMARY: The Defense Acquisition
 Regulations Council is proposing
 changes to the Defense FAR Supplement
 to amend parts 219 and 252 to
 incorporate DoD policy on eligibility of
 joint ventures including small
 disadvantaged businesses for small
 disadvantaged business evaluation and
 award preferences.

DATES: Comments on the proposed
 DFARS rule should be submitted in
 writing to the address shown below on
 or before December 31, 1992 to be
 considered in the formulation of a final
 rule.

ADDRESSES: Interested parties should
 submit written comments to The
 Defense Acquisition Regulations
 Council, ATTN: DMD SD130, OUSD(A),
 3002 Defense Pentagon, Washington, DC
 20301-3002. FAX (703) 887-9845.
 Please cite DAR Case 91-54 in all
 correspondence related to this issue.
FOR FURTHER INFORMATION CONTACT:
 Mrs. Alyce Sullivan, (703) 887-7266.

SUPPLEMENTARY INFORMATION:

A. Background

Section 1207 of Public Law 99-891, as
 amended, sets a goal for the Department
 of Defense to award five percent of
 contract and subcontract dollars to
 small disadvantaged business (SDB)
 concerns, historically Black colleges and
 universities, and minority institutions.
 The Director, Office Secretary of
 Defense, Small and Small
 Disadvantaged Business Utilization, has
 determined as a matter of policy that
 joint ventures including SDBs and
 disadvantaged small businesses
 may, subject to certain eligibility
 criteria, be eligible to participate in the
 SDB preference programs.

B. Regulatory Flexibility Act

The proposed rule is not expected to
 have significant economic impact on a
 substantial number of small entities

within the meaning of the Regulatory
 Flexibility Act, 5 U.S.C. 601 et seq.,
 because it parallels the existing Small
 Business Administration policy on joint
 ventures. The impact on small entities
 as a result of this would be beneficial.
 An initial regulatory flexibility analysis
 has, therefore, not been performed.
 Comments are invited from small
 businesses and other interested parties.
 Comments from small entities
 concerning the affected DFARS sections
 will also be considered in accordance
 with section 616 of the Act. Such
 comments must be submitted separately
 and cite DFARS Case 92-610 in
 correspondence.

C. Paperwork Reduction Act:

The proposed rule does not impose
 any reporting or recordkeeping
 requirements which require the
 approval of OMB under 44 U.S.C. 3501,
 et seq.

List of Subjects in 48 CFR Parts 219 and 252

Government Procurement.

Claudia L. Neagle,
 Executive Editor, Defense Acquisition
 Regulation Council.

Therefore, it is proposed that 48 CFR
 parts 219 and 252 be amended as
 follows:

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERN

1. The authority citation for 48 CFR
 parts 219 and 252 continues to read as
 follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2302,
 Defense FAR Supplement 301.301.

2. Section 219.001 is revised to read
 as follows:

219.001 Definitions.

The definition of "small
 disadvantaged business concern" to be
 used for DoD contracts is in the
 provisions of 252.219-7000 and is
 different from the definition in FAR
 18.001. For purposes of contract
 opportunities, SDB joint ventures, as
 defined in 252.219-7000, have the same
 status as SDB concerns.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.219-7000 is amended
 by revising paragraph (d) to read as
 follows:

252.219-7000 Small Disadvantaged
 Business Concern Representation (DoD
 Contracts).

(d) Definitions.

As used in this provision—

(1) Small Disadvantaged business concern, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term includes small disadvantaged business joint ventures. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively. In general, 13 CFR part 124 describes a small disadvantaged business concern as a small business concern—

(i) Which is at least 51 percent
 unconditionally owned by one or more
 socially and economically disadvantaged
 individuals; or

(ii) In the case of any publicly owned
 business, at least 51 percent of the voting
 stock is unconditionally owned by one or
 more socially and economically
 disadvantaged individuals; and

(iii) Whose management and daily business
 operations are controlled by one or more
 such individuals.

(2) Small disadvantaged business joint
 venture is a business arrangement in which:

(i) Each company in the venture is small,
 at least one of the companies is small
 disadvantaged, and the joint venture as a
 whole is small pursuant to section (1) of the
 Small Business Act and Implementing
 regulations, 13 CFR part 124;

(ii) The majority of the venture's earnings
 accrue directly to the socially and
 economically disadvantaged individuals in
 the SDB concern(s) in the joint venture; and

(iii) The management and daily business
 operations are controlled by the SDB
 concern(s) in the venture.

(iv) A signed agreement is executed by
 eligible concern(s) for the purpose of
 performing a specific contract prior to the
 submission of offers. SDB joint venture
 agreements must contain provisions which:

(A) Designate the parties to the joint
 venture as co-managers;

(B) Clearly establish that the majority of the
 SDB joint venture earnings will accrue to the
 socially and economically disadvantaged
 individuals in the SDB concern(s) in the joint
 venture;

(C) Specify the responsibilities of the
 parties with regard to contract performance,
 source of labor, and negotiation of the
 contract and any subcontracts to the SDB
 joint venture;

(D) Itemize and describe all major
 equipment, facilities, and other resources to
 be furnished by each participant to the SDB
 joint venture, with a detailed schedule of the
 cost or value of each; and

(E) State that all accounting and other
 administrative records relating to the joint
 venture shall be maintained by an SDB
 concern in the joint venture.

4. Section 252.219-7001 is amended
 by revising paragraph (a) and adding
 paragraph (f)(3), to read as follows:

252.219-7001 Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns.

(a) **Definitions.**

As used in this clause—

(1) **Labor surplus area** means a geographical area identified by the Department of Labor as an area of labor surplus.

(2) **Labor surplus area concern** means a concern that, together with its first tier subcontractors, will perform substantially in labor surplus areas.

(3) **Perform substantially in labor surplus areas** means that the costs incurred under the contract as account of manufacturing, production, and performance of services in labor surplus areas exceed 50 percent of the contract price.

(4) **Small business concern** means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(5) **Small disadvantaged business concern**, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term includes small disadvantaged business joint ventures. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(6) **Small disadvantaged business joint venture**, as used in this clause, is a business arrangement in which—

(i) Each company in the venture is small, at least one of the companies is small disadvantaged, and the joint venture as a whole is small pursuant to section (3) of the Small Business Act and implementing regulations, 13 CFR part 121;

(ii) The majority of the venture's earnings accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture; and

(iii) The management and daily business operations are controlled by the SDB concern(s) in the venture.

(iv) A signed agreement is executed by eligible concerns, for the purpose of performing a specific contract, prior to the submission of offers. SDB joint venture agreements must contain provisions which:

(A) Designate the parties to the joint venture as co-managers;

(B) Clearly establish that the majority of the SDB joint venture earnings will accrue to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture;

(C) Specify the responsibilities of the parties with regard to contract performance, source of labor, and negotiation of the contract and any subcontract to the SDB joint venture;

(D) Itemize and describe all major equipment, facilities, and other resources to be furnished by each participant to the SDB joint venture, with a detailed schedule of the cost or value of each; and

(E) State that all accounting and other administrative records relating to the joint venture shall be maintained by an SDB concern in the joint venture.

(f) **Agreements.**

(1) A small disadvantaged business joint venture officer, upon request by the Contracting Officer, agrees to submit a signed SDB joint venture agreement, as described in paragraph (d)(6) of this clause.

6. **Section 252.219-7002 is amended by revising paragraphs (a) and (c) to read as follows:**

252.219-7002 Notice of Small Disadvantaged Business Set-Aside.

(a) **Definitions.**

As used in this clause—

(1) "Small Disadvantaged business concern," means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term includes small disadvantaged business joint ventures. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(2) **Small disadvantaged business joint venture**, is a business arrangement in which—

(i) Each company in the venture is small, at least one of the companies is small disadvantaged, and the joint venture as a whole is small pursuant to section (3) of the Small Business Act and implementing regulations, 13 CFR part 121;

(ii) The majority of the venture's earnings accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture; and

(iii) The management and daily business operations are controlled by the SDB concern(s) in the venture.

(iv) A signed agreement is executed by eligible concerns, for the purpose of performing a specific contract, prior to the submission of offers. SDB joint venture agreements must contain provisions which:

(A) Designate the parties to the joint venture as co-managers;

(B) Clearly establish that the majority of the SDB joint venture earnings will accrue to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture;

(C) Specify the responsibilities of the parties with regard to contract performance, source of labor, and negotiation of the contract and any subcontract to the SDB joint venture;

(D) Itemize and describe all major equipment, facilities, and other resources to be furnished by each participant to the SDB joint venture, with a detailed schedule of the cost or value of each; and

(E) State that all accounting and other administrative records relating to the joint venture shall be maintained by an SDB concern in the joint venture.

(f) **Agreement.**

(1) A small disadvantaged business manufacturer or regular dealer, which submits an offer in its own name, agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(2) A small disadvantaged business joint venture officer, upon request by the Contracting Officer, agrees to submit a signed SDB joint venture agreement, as described in paragraph (a)(2) of this clause.

(End of clause)

7. **Section 252.219-7006 is amended by revising paragraph (a), and adding paragraph (d)(4), to read as follows:**

252.219-7006 Notice of Evaluation Preference for Small Disadvantaged Business Concerns.

(a) **Definitions.**

As used in this clause—

(1) **Historically Black colleges and universities** means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 806.2.

(2) **Minority institutions** means institutions meeting the requirements of paragraphs (3), (4), and (5) of Section 312(b) of the Higher Education Act of 1965 (20 U.S.C. 3005). The term also means any nonprofit research institution that was an integral part of a historically Black college or university before November 14, 1966.

(3) **Small Disadvantaged business concern**, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term includes small disadvantaged business joint ventures. This term also means a small business concern, owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(4) **Small disadvantaged business joint venture**, is a business arrangement in which—

(i) Each company in the venture is small, at least one of the companies is small disadvantaged, and the joint venture as a whole is small pursuant to section (3) of the Small Business Act and implementing regulations, 13 CFR part 121;

(ii) The majority of the venture's earnings accrue directly to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture; and

(iii) The management and daily business operations are controlled by the SDB concern(s) in the venture.

(iii) The management and daily business operations are controlled by the SDB concern in the venture.

(iv) A signed agreement is executed by eligible concerns, for the purpose of performing a specific contract, prior to the submission of offers. SDB joint venture agreements must contain provisions which:

(A) Designate the parties to the joint venture as co-managers;

(B) Clearly establish that the majority of the SDB joint venture earnings will accrue to the socially and economically disadvantaged individuals in the SDB concern(s) in the joint venture;

(C) Specify the responsibilities of the parties with regard to contract performance, source of labor, and negotiation of the contract and any subcontracts to the SDB joint venture;

(D) Itemize and describe all major equipment, facilities, and other resources to be furnished by each participant to the SDB joint venture, with a detailed schedule of the cost or value of each; and

(E) State that all accounting and other administrative records relating to the joint venture shall be maintained by an SDB concern in the joint venture.

* * *

(d) Agreements. * * *

(4) Upon request, a small disadvantaged business joint venture offeror agrees to submit a signed SDB joint venture agreement, as described in paragraph (a)(4) of this clause.

(End of clause)

[FPR Doc. 92-29019 Filed 11-30-92, 8:45 am]
BILLING CODE 8510-01-01

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 663

[Document No. 821100-2200]

Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NOAA issues this proposed rule to designate as "routine" the setting of trip landing and frequency limits for Pacific whiting. The trip landing and frequency limits would be used prior to the regular season opening date and when the large-scale whiting fishery reaches or is projected to reach the annual whiting harvest guideline. This action is authorized under Amendment 4 to the Pacific Coast Groundfish Fishery Management Plan (FMP) and is intended to allow small quantities of whiting to be retained and landed during periods when the fishery would otherwise be closed.

DATES: Comments on the proposed rule must be received on or before December 10, 1992.

ADDRESSES: Comments on the proposed rule should be sent to Mr. Rolland A. Schmitt, Director, Northwest Region, National Marine Fisheries Service, 7800 Sand Point Way NE, MSN C15700, Seattle, WA 98115-0070; or Dr. Gary Matlock, Acting Director, Southwest Region, National Marine Fisheries Service, 801 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213.

Copies of relevant reports and information, Amendment 4 to the FMP, and the environmental assessment/regulatory impact review for this action are available from Mr. Rolland A. Schmitt, Director, Northwest Region, National Marine Fisheries Service, at the address above.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206-828-8140, Rodney R. McInnis at 310-980-4030, or the Pacific Fishery Management Council at 503-328-6352.

SUPPLEMENTARY INFORMATION:

Background

Amendment 4 to the FMP was approved on November 15, 1990, and the implementing regulations became effective on January 1, 1991. This action is being proposed according to the procedures under Amendment 4 to the FMP that authorize the designation of certain management measures as "routine." That designation means that for the specific species, gear types, and management measures, implementation and further adjustment of those management measures may occur after consideration at a single meeting of the Pacific Fishery Management Council (Council) and after publication of a notice in the Federal Register. Only management measures that are for the same purpose, and that are within the scope of the analysis conducted when the action was designated routine, may be implemented in this manner.

Descriptions of management measures being designated as "routine" are published in the Federal Register and codified in the implementing regulations at 50 CFR 663.23, thus informing the public of the species and gear types that are likely to have a specific management measure imposed.

At its September 1992 meeting, the council recommended that trip landing or frequency limits applied to landings of Pacific whiting before and after the regular whiting season (the regular whiting fishery begins April 15 and normally ends when the harvest guideline or quota is reached) be designated as routine. The purposes for

this designation are to provide the administrative mechanism to end the large-scale whiting fishery when the annual harvest guideline is reached, to allow the small fisheries that catch whiting for the fresh fish markets and for bait to continue at times of the year when the large-scale whiting fisheries are prohibited, and to allow landings of the small quantities of whiting taken while fishing for other groundfish species. These purposes are exactly the type of purposes that would justify imposition of routine management measures under 50 CFR 663.23(c)(1)(ii): To keep landings close to the specified harvest levels; to extend the season; to minimize disruption of traditional fishing and marketing patterns; to reduce discards; to discourage target fishing while allowing small incidental catches to be landed; and to allow small fisheries to operate outside the normal season.

These small whiting fisheries are distributed along the Pacific coast of Washington, Oregon, and California, and have very little impact on the total landings of whiting. The whiting from these fisheries that enter the fresh fish markets have a high unit value, and the income from whiting is important to these operations. For groundfish fisheries directed at other groundfish species that unavoidably take small amounts of whiting, this proposed rule if adopted will prevent the waste and extra cost to the vessel operator caused by requiring the sorting of the catch onboard the vessel and the discard of all whiting taken before and after the main whiting season.

Furthermore, no straightforward administrative mechanism currently exists in the regulations that implement the Pacific Groundfish FMP that would allow NMFS to end the large-scale whiting season when the harvest guideline is reached. During 1992, NMFS had to utilize the more complex "points of concern" mechanism in the FMP to close the large-scale fishery (57 FR 49423, November 2, 1992). This proposed rule would allow NMFS to prevent overfishing of whiting while allowing small quantities of whiting to be retained and landed when the fishery would otherwise be closed. Depending on the specific circumstances, NMFS may impose a trip limit at the end of the regular whiting season either when the harvest guideline is projected to be reached, thus allowing small quantities of whiting in excess of the harvest guideline to be landed, or prior to achievement of the harvest guideline so that the total of all whiting landings for the fishing year does not exceed the harvest guideline.



91-54-3

Office Products**Boise Cascade**

800 West Bryn Mawr Avenue
Itasca, Illinois 60143
708/773-5000

December 23, 1992

Defense Acquisitions Regulations Council
Attn: IMD-3D139
OUSD(A)
3062 Defense Pentagon
Washington, DC 20301-3062

Subject: D.O.D. Regulatory Amendment-Joint Ventures of Small Business Enterprises with M.B.E.s - DAR Case 91-54

Dear Sirs:

We have reviewed DAR Case 91-54 from the December 1, 1992 Federal Register. We appreciate the opportunity to give feedback to the D.O.D. about the administration of M.B.E credits.

Boise Cascade wholeheartedly supports minority business, both in spirit and in practice. Enclosed you'll find the "Opportunity" catalog, our program to foster the economic growth of minorities. Of particular interest are the mission statement and the supplier biographies. As a distributor of office products, Boise Cascade is fully committed to fostering the highest possible attainment of economic growth for minorities. Consequently, we are deeply concerned about the inadvertent encumbrance to growth created by administrative regulations at both the D.O.D. and other government agencies.

The issue limiting growth of M.B.E.s is the regulation which only allows end-users to claim credit for goods bought directly from M.B.E. manufacturers or distributors. This regulation effectively leaves large national distributors out of the procurement process, which causes an unfair inefficiency of scale for the M.B.E. The M.B.E. manufacturer is forced to either sell his goods direct to end user corporations, thereby incurring very high individual transaction costs, or to sell through M.B.E. dealer/distributors, who are normally very small, under-capitalized, local in scope and lacking in scale. In either case, the M.B.E. never gets a chance to get to economies of scale, therefore a cycle is perpetuated that brings him less profits and less ability to grow and be competitive than his non-minority competitors.

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Most major corporations today would never have gotten to their current size and profit structure without the ability to go through efficient distributors (i.e., Xerox, Polaroid, Georgia Pacific, 3M, etc.) and therefore gain in economies of scale. In fact, most corporate giants, including the above companies, continue to use distribution on an ongoing basis even after achieving economies of scale.

The benefits of gaining scale by dealing through distributors are as follows:

- Larger production runs.
- Steadier more forecastable business with less fluctuations.
- Less accounts to carry and faster cash flow.
- The distributor carries "on the shelf" inventory which allows the manufacturer to "make to order" eliminating inventory carrying costs.
- Lower packaging and distribution costs result from selling in larger lots.
- Sales and marketing activities are provided for the manufacturers by the distributor.
- The distributor already knows how to navigate through the infrastructures of corporate America.
- Procurement costs for end users go down by buying from a full line distributor due to amalgamation of lines.
- The computer systems and delivery systems needed for corporate America's demanded services gets spread over a huge number of customers when provided by the distributor. The manufacturer cannot afford to individually tailor their systems and services to end users.
- It allows the M.B.E. to focus on his core business, not being burdened with additional distribution concerns.
- Economic growth equals more jobs for minorities; growth requires scale; there is no scale without the ability to reach broad markets geographically.

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The slow economy of the '90s necessitates that corporate America take dramatic cost-saving steps to survive. One such step is to downsize their supplier base, to both cut procurement costs and increase negotiating power through volume. M.B.E.s are the unfortunate casualty in this downsizing mode. The M.B.E. is typically small, relatively narrow in product mix, and often not as competitive as larger companies. Corporate America is struggling with doing business with minorities just because it's "the right thing to do." To survive, minority business must make long term economic sense. That's where Boise Cascade's program provides the critical link between the end user's needs and expectations and the minority supplier's needs and abilities in a relationship that makes economic sense for all members of the distribution chain. The N.M.S.D.C., as well as other noteworthy advocates for Minority Business development, have acknowledged both the need for M.B.E.'s to gain scale and to be able to compete in an age of supplier base downsizing; they have, therefore, changed their position from disallowing second-tier purchases to wholeheartedly endorsing and promoting it.

The key elements of Boise Cascade's M.B.E. program are:

- We bring together the products of many historically disadvantaged suppliers to provide "one stop shopping" for the end user, as he places one purchase order for all of his office product needs.
- We developed a computerized tracking system to report to the end user his M.B.E. purchases separate from other purchases for reporting M.B.E. credits.
- Boise Cascade does not claim M.B.E. credits for any products purchased for resale and can substantiate that there is no "double dipping."
- We provide next day delivery throughout the U.S. on M.B.E. goods (we hold the inventories: no wait for the customer; no inventory for the supplier).
- All M.B.E. suppliers are certified with the N.M.S.D.C. as well as with many other credible certifying agencies.
- We provide special 10-day payment terms to M.B.E.s.
- We mentor the M.B.E. supplier in all aspects of his business.

Further advantages of utilizing our second tier purchase program are detailed on the enclosed presentation entitled "The Critical Link." You'll notice that the economic advantages are realized by all three parties in this chain. While we're very willing to waive any M.B.E. credit claims for M.B.E. purchases and act strictly as the middle man, we feel the end user should be allowed to count these credits toward their fulfillment of M.B.E. credit goals.

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December 23, 1992

We appreciate your consideration in amending D.O.D. regulations to allow credits earned through second tier distribution to count for M.B.E. credit fulfillment.

Sincerely,

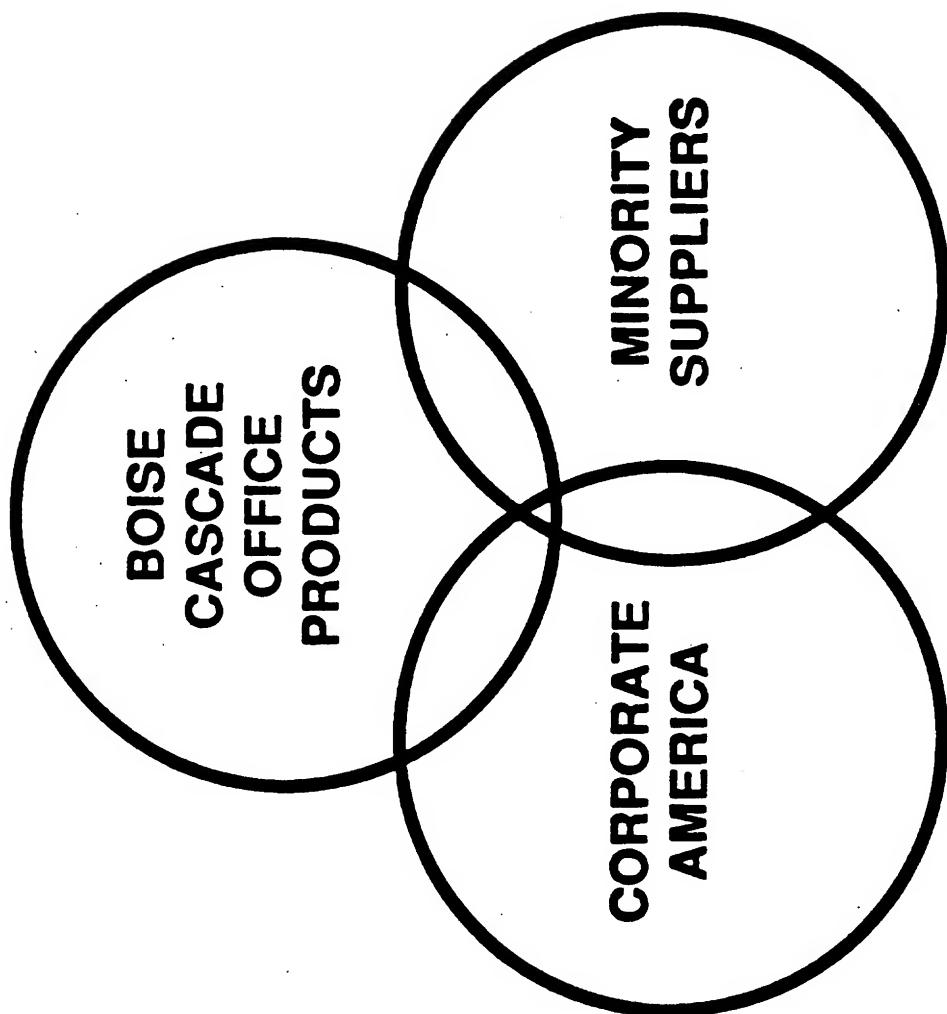


Jennifer A. Ruth
Minority Supplier Coordinator

Enclosure

cc: Horace J. Crouch, Director
Harriet Michel - Executive Director of N.M.S.D.C.
Maye Foster-Thompson - Executive Director of C.R.P.C.

THE CRITICAL LINK



**Traditionally, There Has Been A High Failure Rate
And Level Of Frustration Experienced When Large
Corporations Have Tried To Buy Office Products
Directly From Minority Suppliers.**

**Boise Cascade Offers To Provide The Critical Link
To Match The Needs And Abilities Of Both Your
Company And Minority Suppliers.**





THE WINNING ELEMENTS OF
BOISE CASCADE'S

M.B.E./ W.B.E./ P.C. PROGRAM

CORPORATE AMERICA



YOUR NEEDS & EXPECTATIONS:

ABILITY TO MEET NEEDS:

	Minority Suppliers	Bolse Cascade
• Cost Center Accounting	No	Yes
• Multiple Site Delivery (Including National Accounts)	No	Yes
• Wrap And Pack	Maybe	Yes
• E D I	No	Yes
• Next Day Delivery	No	Yes
• 98% Line Fill Rate In 24 Hours	No	Yes
• Electronic Usage Reports	No	Yes
• Local Sales Representation	No	Yes
• Single Source For Office Products	No	Yes
• Special Labeling/Handling Of Goods	No	Yes
• "No Hassel" Returns	Maybe	Yes
• Minority Made/Distributed Products	Yes	Yes
• Quality Products At Competitive Prices	Yes	Yes

MINORITY SUPPLIERS

MINORITY SUPPLIER'S NEEDS & EXPECTATIONS:

ABILITY TO MEET NEEDS:

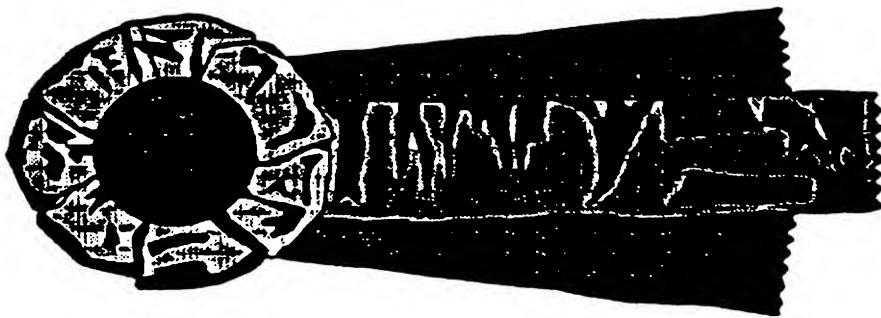
	Your Company	Bolse Cascade
• Sales/Marketing Materials & Expertise	No	Yes
• Large National Office Products Sales Force	No	Yes
• Large Order Size Quantities	No	Yes
• Longer P. O. Leadtimes	Maybe	Yes
• Prompt Payment	Maybe	Yes
• Business Development Coaching	Maybe	Yes
• Easy Navigation Through Customer Infrastructure	No	Yes
• Product Usage Forecasting	Maybe	Yes

MINORITY SUPPLIERS . . .

BOISE CASCADE . . .

AND YOU,

**A
THREE-WAY
WIN !!!**



MBE DEVELOPMENT



In Response To Increasing Customer Requests For Products Manufactured Or Supplied By Minority Businesses, Boise Cascade Office Products Is Escalating Its Commitment To The Development Of Minority Suppliers. To Maximize The Opportunity Of Dealing With These Suppliers, A High Level Of Support And Coaching Is Being Provided To Those Who May Need It To Meet Boise's Supplier Performance Standards.

MBE DEVELOPMENT



1. We Visit Manufacturer Facilities Of Minority Firms.
2. Arrange For Minority Firms To Visit Boise Cascade Operations To Increase Their Understanding Of How We Do Business.
3. Provide Each Supplier With A Couple Of Local Boise Managers For Coaching In All Aspects Of Their Business, As Desired.
4. Conduct Monthly Business Reviews With Minority Suppliers.
5. Print A Separate Catalog Featuring Minority Products, To Allow Suppliers To Grow At Their Own Pace With Boise.
6. Provide Main Catalog Exposure Only After A Supplier Has Demonstrated The Ability To Consistently Meet Boise's Service Requirements.
7. Encourage Customers To Add MBE Products To Their Contracts And E-Z Order Forms.
8. Provide A Usage Reporting System To Total & Detail MBE/WBE/Physically Challenged Purchases.
9. Help Qualified Suppliers Get Certified.
10. Utilize MBE Suppliers For Internal Services.

LOUIS N. HAAS*
 MELVIN K. NAJARIAN*
 DAVID E. BUNIM*
 ROBERT C. NICHOLAS*
 AARON S. MILBERG
 LAWRENCE P. BECK
 CHRISTOPHER B. INGRAM
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 DANIEL B. HOYE
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HAAS & NAJARIAN
 A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
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OF COUNSEL
 TIMOTHY H. POWER
 NANCY HO

OUR REFERENCE

December 23, 1992

VIA FAX (Original follows by mail)

The Defense Acquisition Regulations Council
 ATTN: IMD 3D139, OUSD(A)
 3062 Defense Pentagon
 Washington, DC 20301-3062

Re: Comment to Proposed Change to DFAR, Parts 219 and 252,
DAR Case 91-54

Gentlemen:

Please consider the following comments to the proposed rule amending 48 CFR parts 219 and 252 (DAR Case 91-54)

Based upon our experience representing minority businesses, two of the proposed changes require either deletion or clarification. The proposed changes are contained in part 252, sections 252.219-7000(a)(2)(iii) and (iv)(E), sections 252.219-7001(a)(6)(iii) and (iv)(E), sections 252.219-7002(a)(2)(iii) and (iv)(E), and sections 252.219-7006(a)(4)(iii) and (iv)(E), which read as follows:

- "The management and daily business operations are controlled by the SDB concerns in the venture."
- "State that all accounting and other administrative records relating to the joint venture shall be maintained by an SDB concern in the joint venture."

Most of the small disadvantaged businesses we represent are in the construction industry and are owned by individuals with particular trade-related skills and job-site-

Defense Acquisition Regulations Council

December 23, 1992

Page 2

related managerial and supervisory skills. Typically these businesses do not have the managerial, administrative and accounting facilities required to perform federal government contracts, which are "paperwork intensive" from an administrative and accounting standpoint. Moreover, these businesses typically have neither adequate financial track records nor sufficient net worth to support the surety relationships necessary to bid and perform federal government contracts (this is especially true in light of the recent regulatory changes restricting the individual surety program). In order to perform federal government contracts, these small businesses form joint ventures with other small businesses which have existing surety relationships (or the financial wherewithal to support same) and the "home office" capabilities to administer and account for federal government contracts, including whatever requirements are imposed by sureties.

The proposed amendments set out above would have the effect of depriving many technically well-qualified small business minority contractors from participating in the SDB program. The traditional model of the minority business having absolute job site responsibility (including management, hiring and firing, dealing with resident engineer types and inspectors, etc.) while the non-minority partner deals with home office administrative and accounting matters, would be eviscerated under the proposed amendment. This model works -- it should not be eliminated.

Thank you for your consideration.

Very truly yours,

HAAS & NAJARIAN



LOUIS N. HAAS

LNH:dls

PHOENIX PETROLEUM CO.



Stephen Wang
Vice President



28 December, 1992

The Defense Acquisition Regulations Council
Attn: IMD 3D 139, OUSD(A)
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 91-54
Federal Register Notice concerning "Joint Venture"
Agreements complying with SDB requirements.

Gentlemen/Mesdames:

Phoenix Petroleum Co. is a SDB concern marketing refined petroleum products. We are writing to support the proposed rule changes that would allow joint ventures between SDB concerns and Small Business (but not SDB) concerns to be eligible to be considered SDBs for evaluation and preference purpose.

The current attitude of the DFSC in implementing PL 99-661 provisions requiring the DFSC to give preference to SDB concerns is terrible--at least with respect to the purchase by the DFSC of refined petroleum products. Clearly, the DFSC is not interested in following the spirit of the legislation; the DFSC has done all it can to not give the preference to SDBs.

Accordingly, any rule change that would allow for more participation opportunities for SDBs to take advantage of PL 99-661 provisions is good. For it would mean that the DFSC would have to work that much harder (and therefore perhaps have less success) in denying SDBs the opportunities mandated by PL 99-661.

Yours very truly

23

91-54-6



HOWELL PETROLEUM PRODUCTS INC.

BROOKLYN NAVY YARD #292
207 FLUSHING AVENUE
BROOKLYN, NEW YORK 11205

(718) 852-9660
FAX (718) 852-9664

December 30, 1992

Fax No. (703) 697-9845

The Defense Acquisition Regulations Council
Attn: IMD 3D 139, OUSD(A)
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 91-54
Federal Register Notice concerning "Joint Venture" Agreements
complying with SDB requirements.

To whom it may concern:

Howell Petroleum Products is a small disadvantaged business located in Brooklyn, NY which has been adversely affected by the D.O.D./D.F.S.C. provision that inhibits the establishment of a supply relationship with small businesses and/or a joint venture under the non-manufacturer rule.

Howell Petroleum Products fully supports the proposed rule changes contained in the Federal Register-56895, December 1, 1992, but would also like to use this opportunity to appeal to the DAR Council and D.O.D to repeal the existing D.O.D/D.F.S.C deviations that would inhibit the establishment of a supply relationships with small businesses and/or a joint venture, in the format being proposed, for S.D.B's who may have aspirations to participate in the D.F.S.C. - Bulk Fuels Program.

Thank you for your consideration.

Very truly yours,

Bill Howell
President

91-54-7

ALEXANDER-ALLEN, INC.

1021 Lancaster Avenue
Bryn Mawr, PA 19010

Telephone: 215 520-0212
Telefax 215 520-8894

December 31, 1992

Defense Acquisitions Regulations Council
ATTN: IMD 3D139, OUSD(A)
3062 Defense Pentagon
Washington, D.C. 20301-3062

VIA FAX NUMBER 703/697-9845

RE: DAR Case 91-54

Gentlemen:

Enclosed please find Alexander-Allen, Inc.'s comments regarding the above proposed rule.

If you should have any questions or comments please do not hesitate to give me a call.

Very truly yours,
GAMXX ENERGY, INC.


ERNEST B. HARDY
President

enclosure

COMMENTS OF GAMXX ENERGY, INC.
TO
SDB JOINT VENTURE PROPOSED RULES
December 31, 1992

The proposed rules, which are changes to the DFARS, 48 CFR Parts 219 and 252, as published in the Federal Register, Vol. 57, No. 231, dated December 1, 1992, at pp. 56895 et seq., are proposed with a request for public comments.

GAMXX Energy, Inc. (hereafter "GAMXX") is an SDB refiner with a bpd. As an SDB, GAMXX has bid on various DFSC solicitations since 1988 and was a successful bidder for the April, 1989 Gulf and East Coast solicitation.

OVERVIEW

There are several difficulties with the proposed rules, with the major one being that the proposed rules provide no real incentive to minority business, while relieving DoD of the need to address, in a meaningful way, the strictures and goals of P.L. 99-661, which established the SDB program and the 5% goal for DoD purchases from small disadvantaged businesses. In addition, the proposed rules merely pay lip service to the true purpose of the SDB program, i.e., the development of minority businesses.

The history of the SDB program, and before it the Section 8(a) program, reveals that the intent of the Congress is often lost if not thwarted by the rules and regulations adopted to implement the expressed will of the Congress. Indeed, the statistics of the minority capital and business formations under the various programs reads like a litany of misguided attempts to foster hope and progress in the minority business community.

The proposed rules simply perpetuate the idea that there will be programs to encourage minority business, when, in reality, there is little or no way that the rules will achieve even a modicum of success, let alone foster a large number of minority businesses.

In addition, the rules, as proposed, are inconsistent and offer no meaningful, concrete guidance as to how the program will be run and what criteria will be applied to the joint ventures. Furthermore, because the rules assume that the businesses to be encouraged do not require large amounts of capital, they place unrealistic limits on the structure of the joint ventures, thereby insuring that none will be able to qualify under the proposed rules.

Because GAMXX is in the refining industry, its comments will primarily be directed to that industry. However, they apply with

equal force to many other heavy manufacturing industries and most industries that produce a tangible product as opposed to a service. When coupled with the capital limitations placed upon a disadvantaged owner of an SDB, and the requirement that the disadvantaged owner receive a majority of the earnings of the business, the additional requirements of the proposed rules make compliance an impossibility in most cases, and an improbability in all others, save only those where the joint venturers seek solely to take advantage of the premium price allowed in the SDB program, and with little or no interest in or hope of building a viable minority business. The real need is for access to capital, which these proposed rules make all the more difficult to achieve.

SPECIFIC PROVISIONS

Under 252.219-7000(a)(2), the definition of a small disadvantaged business joint venture includes the following requirement, at Subsection (ii):

The majority of the venture's earnings accrue directly to the socially and economically disadvantaged individuals in the SDB concern in the joint venture...

This rule, in effect, requires an SDB which is in an industry which requires capital, to meet conflicting requirements which make it impossible to be in compliance, and thus, effectively, means that an SDB cannot avail itself of the joint venture program. As an illustration, assume that the industry (such as the refining industry) requires the SDB concern to have equity in the plant and equipment, as well as in the inventory. Typically, a refinery will have a replacement cost of in excess of \$100 million, and for a refinery of a modest size (e.g., 1/3 of the size standard to be a small business), the inventory working capital will be in the range of \$35-50 million at today's crude oil and refined product prices. Thus, the capital requirements of such a refinery, figured at a modest lot, would amount to between \$13.5-15 million. This need is contrasted with the limitation of the SDB program that the economically and socially disadvantaged owner may not have a net worth in excess of \$250,000 (exclusive of his interest in the business and his home) and makes it abundantly clear that such a disadvantaged owner must have some business partners to provide the necessary equity and who will, in return, require the owner to give up a portion of the interest in the business. Since the SDB regulations require the disadvantaged owner to have at least a 51% ownership of the business, it is reasonable to assume that a 51-49% split will not be uncommon.

Thus, the real need, access to both debt and equity capital, is inconsistent with ownership by the socially and economically disadvantaged individuals since, by definition, the disadvantaged individual cannot be the source of the equity or provide the security for the debt.

Coupled with the above structure, the regulations then require that the disadvantaged owner also receive at least 51% of the earnings of the joint venture. If the disadvantaged owner only owns 51% of the SDB and the SDB only owns 51% of the joint venture, then, absent some arrangement which significantly alters the traditional notion of sharing of earnings in a joint venture, there is no way the disadvantaged owner can take 51% of the earnings from the joint venture. At best, his portion would be 51% of 51%, or 26.01%.

This definitional anomaly is repeated in 252.219-7001(6)(ii).

In the refining industry, it would also be necessary to define the accounting system to be employed to allocate the costs to the various products of the refinery. Only a small portion of the output of a refinery is generally subject to solicitation by DoD. Indeed, depending on the bids submitted, and given the environmental regulations and changes in DoD specifications, in the future the percentage of government products, as opposed to those sold into the commercial markets may be less than 20%. However, the costs associated with the refining of a barrel of crude oil may be allocated in a manner which allows the owner of the refinery to recover his costs excessively, to the detriment of the SDB concern. This makes the proposed rules a license to increase the cost to the DoD of procuring needed supplies, with the majority of the premium over the market price to be paid to the non-SDB joint venturer as an increased cost. This will not only siphon off the profits to be earned by the SDB, but also will not encourage or facilitate the development of a self-sustaining business by the SDB. Indeed, this only forces the SDB to be at the mercy of the non-SDB refinery.

Since the rules provide for a sharing of earnings, there is no reason for an SDB refinery to do a joint venture, since the contract with DoD will ordinarily be financable. Thus, the only joint ventures will be with non-SDB refineries and likely SDB fuel oil dealers or others with no expertise or refining experience. Thus, the net effect will be to create one year joint ventures where a minimum of 49% of the SDB "premium" over the market price is paid to the non-SDB as its share of the profits, plus any increased costs that can be shifted to the joint venture.

The rules also provide that the SDB concern shall be in day to day control of the joint venture. 252.219-7000(a)(2)(iii) and 252.219-7001(6)(ii). Where the joint venture consists of a refiner and an SDB "markete", what is "management and daily business operations" which are to be controlled by the SDB? Since a barrel of crude may have only 20% of government products and only those products are being sold to the government, then, do the rules require the SDB to simply to control the storage tanks where the government products are stored and to schedule the deliveries to the government. Anything further on the production side would be to require the non-SDB to give up control of the refinery and its non-

government business. While the SDB could do the billing for the joint venture, the allocation of costs would need to take into account the costs incurred by the non-SDB and would be subject to forces beyond the control of the SDB and perhaps not disputable by the SDB. Since the non-SDB would be buying the crudes and striking the arrangements for such purchases, there would be significant opportunity to enter into arrangements which were highly beneficial to the non-SDB and quite expensive to the joint venture. Policing this by the SDB, which, typically would not have the expertise or clout to effectively prove an overcharge, would be difficult if not impossible, thereby requiring the DFSC to significantly increase its audit and review function for the joint ventures, as well as to triple the review process to qualify a joint venture bidder, since it would be necessary to qualify the SDB, the non-SDB, the combination of the two, and the legality and sufficiency of the joint venture agreements.

In addition to the cost of the crude oil to be refined, the accounting assumptions for the allocation of the fuel costs, power usage and chemicals would be critical to determining the profitability of the joint venture and the costs are not known in advance with sufficient precision to allow the auditors to determine if they have been weighted in favor of the non-SDB.

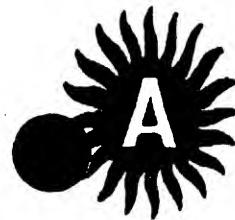
Finally, the advantage to the non-SDB in such joint venture, without some improper enhancement of a type described above, or otherwise, is minimal and, under the proposed rules be unlikely to induce such non-SDB to embark on such a joint venture. Thus the rules would either fail to generate joint ventures, or, alternatively, encourage non-SDBs to seek to enhance their earnings by improper means.

Finally, assuming that such joint ventures would occur, with a 51-49% split, the net effect would be to reduce the 5% goal to a 2.55% goal, by giving 49% of the benefit to the non-SDB partners in the joint ventures, without any concomitant shift of benefit to SDBs. Furthermore, with the exception of the financial gain from an individual contract (for one year), the SDB would not be building a business, since the non-SDB would be able to end the joint venture at the end of any contract, and the SDB would thereby be out of business.

In this regard, it is important to note that there are very few small refineries presently operating which would be capable of producing the government products. In addition, the number of these refineries will be substantially reduced as and when the government switches from JP-4 to JP-8, since many of the small refineries cannot economically produce JP-8 and thus will be unable to bid on the government contracts. (This so despite the fact that DFSC has given more than adequate notice and time for small refiners to determine if they will switch to JP-8. Most small refiners and SDBs lack access to the capital required to make the

necessary changes.) This will only shrink the number of refineries available to joint venture with the SDBs and increase the cost of the fuels to DFSC.

In addition, in 252.219-7000(a)92)(iii) requires the SDB to be in control, yet subsection (iv) requires the joint venture agreement to "designate the parties to the joint venture as co-managers." These rules are clearly inconsistent and cannot be complied with at the same time. This same inconsistency is repeated in 252.219-7001(a)(6)(iii) and (iv)(A) and 252.219-7002(a)(2)(iii) and (iv)(A). It is also repeated in 252.219-7006(a)(4)(iii) and (iv)(A).



ALLIED PETRO INC.

January 27, 1993

Defense Acquisition Regulations Council
3062 Defense Pentagon
Washington , DC 20301-3062

Fax Transmission: Fax No. (703) 697-9845

Attn: IMD 3D139, OUSA(A) DAR Case 91-54:

These comments are submitted in response to the DoD's notice and request for comments on the "Defense Federal Acquisition Regulation Supplement: Joint Venture" DAR Case 91-54 ("Proposed Rule" or "Rule"), published in the Federal Register on December 1, 1992, Volume 57 No. 231.

The intent of the Rule appears to be one of increasing the opportunities for Small Disadvantaged Businesses to participate in the Department of Defense contracting program. If such is the intent, the proposed Rule provides a mechanism for DoDs to comply with instructions from Congress contained in the conference reports accompanying DoD legislation and several written communications from Congressional leaders to the effect that the DoD should ensure that a large number of SDB concerns can benefit from SDB programs.

When Congress created the Small Disadvantaged Business Program in November of 1986, it directed that the program include as many SDBs as possible. Section 1207 of the National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 stat. 3816, 3973, instituted a set-aside program for small disadvantaged businesses ("SDBs") and established a goal of awarding five percent of all DoD contract dollars to SDBs. To meet the minority contracting goal, Congress instructed the Secretary of Defense to use "his utmost authority, resourcefulness, and diligence". Furthermore, 10 U.S.C. §2301 instructed the DoD to "maximize the number of minority concerns participating in the program". However, the DoD itself has established implementing regulations which have limited SDB participation. The proposed Rule appears to remove limitations to access SDB program benefits based on the type of the SDB involved and is written in a manner which increases SDB opportunities for participation in those programs.

This straightforward interpretation of the Rule provides a mechanism for achieving the objective contained in the May 1992 House Armed Services Committee proposal for the FY93 Defense

9000 Southwest Freeway, Suite 107 Houston, Texas 77074

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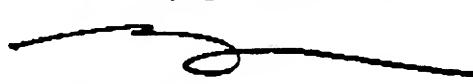
Appropriation Bill which would have permitted greater SDB dealer participation in one of the DoD's major procurement programs, specifically the bulk fuels program. The proposed House Committee wording was not included in the National Defense Authorization Act for Fiscal Year 1993, but the objectives of the wording were strongly supported by the House/Senate conference report which directed "the Secretary to conduct a prompt review of DoD and prime contractor efforts to increase subcontract awards to small businesses and small disadvantaged businesses and to propose additional strategies to increase such awards."

The proposed Rule as written does not fully clarify that a joint venture entity is considered to be the equivalent of a SDB manufacturer insofar as preference awards are concerned. This intent should be clarified by changing the last word in paragraph 219.001 from "concerns" to "manufacturers". Without that word change it is possible that the intent of the regulation could be misinterpreted and suggest that a joint venture SDB concern is actually a SDB regular dealer by virtue of the controlling joint venture partner being an SDB dealer, thereby under the provisions of 252.219-7002(c) it would have to furnish product manufactured by an SDB manufacturer.

The wording in the proposed Rule would also be improved by changing the wording in 252.219-7002(c)(2) to the following: "A small disadvantaged business joint venture offeror which submits an offer agrees to furnish in performing this contract only end items manufactured or produced by a small business manufacturer in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. Furthermore, the offeror, upon request by the Contracting officer, agrees to submit a signed SDB joint venture agreement, as described in paragraph (a)(2) of this clause."

When the proposed Rule is put into effect there needs to be a change in 13C.F.R.\$124.109(e) which states: "A concern which is owned in whole or in part by another business concern and relies on the disadvantaged status of that concern to claim disadvantaged status is ineligible for 8(a) Program Participation and for participation in the Defense Department's Small Disadvantaged Business program...." This SDB regulation would have to be changed to permit the type of joint ventures contemplated by the proposed Rule. This problem could be solved by adding the following preface to 13C.F.R.\$124.109(e), "Except for the case of a small disadvantaged business joint venture...."

With the changes proposed in this letter Allied Petro, Inc. strongly supports the proposed Rule.


Gerald Pratt
Chairman & CEO

91-54-9

DOYLE & BACHMAN

ATTORNEYS AT LAW

SUITE 1000

919 EIGHTEENTH STREET, NORTHWEST
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(202) 659-4240

FACSIMILE (202) 887-5138

January 28, 1993

BY HAND DELIVERY

Mrs. Alyce Sullivan
Defense Acquisition Regulations Council
ATTN: IMD 3D139, OUSD(A)
3062 Defense Pentagon
Washington, D.C. 20301-3062

Re: Comments on DAR Case 91-054

Dear Mrs. Sullivan:

Barrett Refining Corporation ("Barrett"), through the undersigned counsel, hereby submits comments on DAR Case 91-054 concerning the small disadvantaged business ("SDB") joint venture rule proposed by the Department of Defense ("DoD"), which was published in the Federal Register on December 1, 1992 at 57 Fed. Reg. 56895.

Barrett is an SDB petroleum refiner that supplies jet fuel to the Defense Fuel Supply Center ("DFSC"). Barrett opposes the proposed SDB joint venture rule as written as contrary to the statute authorizing the DoD SDB Program and the existing SDB implementing regulations.

Barrett's position is that the proposed SDB joint venture rule as written will permit non-SDB manufacturers to team with SDB regular dealers solely to take advantage of the SDB price premium available in the DoD SDB Program. This will be to the detriment of the SDB Program and to the development of SDB manufacturers. If the proposed SDB joint venture rule is to go forward, Barrett respectfully suggests that the rule be amended in several key respects in order to overcome these problems.

Mrs. Alyce Sullivan
January 28, 1993
Page 2

The Proposed SDB Joint Venture Rule
Is Contrary To Congressional Intent

The intent of Congress when it passed the DoD SDB Program as part of the National Defense Authorization Act of 1987 (Section 1207, P.L. 99-961, now codified at 10 U.S.C. § 2323) was to fund minority business development through competitive procedures. The DoD SDB Program was specifically designed to open America's free enterprise system to small disadvantaged businesses, particularly manufacturers, by creating access to the lucrative defense marketplace.

The intent was not to foster a strata of companies dependent upon federal assistance in order to survive, such as SDB regular dealers created solely as fronts for non-disadvantaged small business manufacturers. The DoD SDB Program clearly did not envision SDB joint ventures comprised of SDB regular dealers acting as fronts for non-SDB manufacturers so as to permit the non-SDB manufacturer to take advantage of the SDB Program.

Rather, the intent was to give SDBs, primarily SDB manufacturers, the initial boost to take on profitable contracts, and, thereby, gain the valuable experience and resources necessary to compete and to eventually succeed. By providing these incentives to disadvantaged small business manufacturers, the DoD SDB Program is also vital to preserving America's domestic defense industrial base.

The proposed rule as written appears to extend the benefits of the DoD SDB Program to non-disadvantaged small business manufacturers who form joint ventures with SDB regular dealers. Under the proposed rule as drafted, an SDB regular dealer would appear free to form a joint venture with a non-disadvantaged small business manufacturer to supply the product of that non-SDB manufacturer. Even though the proposed rule requires that the majority of the joint venture's earnings must accrue to the SDB concern in the venture, the earnings of the joint venture could easily be manipulated by the non-SDB manufacturer through the use of an independent supply agreement with the joint venture. In this way, the non-SDB manufacturer in the joint venture can control (and reduce) the earnings of the joint venture by setting its own price to be charged to the joint venture for the product. The effect of this manipulation by the non-SDB manufacturer would be to create a shell of a joint venture, with the SDB regular dealer operating as the front used solely to permit the non-SDB manufacturer to take advantage of the DoD SDB price premium.

Barrett suggests that if the proposed SDB joint venture rule goes forward that it be amended to make clear that the SDB joint venture itself must still supply product of an SDB manufacturer

Mrs. Alyce Sullivan
January 28, 1993
Page 3

as consistent with the existing SDB regulations discussed below. Further, the proposed rule should also be clarified to make clear that if the SDB joint venture is comprised of an SDB regular dealer and a non-SDB manufacturer, then the SDB joint venture will not be considered as an "SDB manufacturer" for purposes of the SDB Program.

In the most recent Defense Authorization Act for Fiscal Year 1993, Congress, in connection with its extension of the term of the program through Fiscal Year 2000, specifically considered a similar proposal extending the DoD SDB Program to non-disadvantaged manufacturers under the guise of a proposed "non-manufacturer" rule. Congress specifically decided not to adopt such a proposal. In the Joint Conference Report accompanying the Defense Authorization Act for FY 1993, Congress instead directed DoD to publish a proposed regulation concerning DoD's version of the non-manufacturer rule which DoD had developed (DAR Case No. 91-055). A copy of the Joint Conference Report language accompanying the Defense Authorization Act is attached hereto as Tab A. DoD has yet to publish DAR Case No. 91-055. Barrett understands that the proposed non-manufacturer rule developed by DoD in DAR Case No. 91-055 would preserve DoD's ability to require SDB regular dealers to provide product of SDB manufacturers.

Therefore, the proposed SDB joint venture rule as set forth in DAR Case No. 91-054 is contrary not only to Congress' intent in establishing the DoD SDB Program but also is contrary to Congress' most recent request actions in extending the term of the program through Fiscal Year 2000. Barrett requests that the proposed SDB joint venture rule either not be pursued or if it is pursued that it be amended to clarify the requirement that SDB regular dealers obtain their product from SDB manufacturers even when they enter into SDB joint ventures, consistent with the existing DoD regulations applicable to the SDB Program which are discussed below.

The Proposed SDB Joint Venture Rule
Would Undermine Existing SDB Regulations

Under the current regulations, SDB regular dealers are required to provide product of SDB manufacturers. The current SDB regulations also sufficiently address those instances where no SDB manufacturers are available from which SDB regular dealers can obtain products and services. There is no legitimate reason for overturning this current regulatory scheme as contemplated in the proposed SDB joint venture rule.

Mrs. Alyce Sullivan
January 28, 1993
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The issue of requiring SDB regular dealers to obtain product and services from SDB manufacturers has been carefully and thoroughly addressed by the current DoD SDB regulations. Under the current regulations, SDB regular dealers are required to provide the product of SDB manufacturers in order to take advantage of the DoD SDB Program. There is no legitimate reason for establishing a different rule for so-called SDB joint ventures.

The proposed SDB joint venture rule appears to reflect a reversal of these existing SDB regulations which are well-established, carefully crafted and consistent with Congressional intent. The proposed SDB joint venture rule would appear to undo what the current SDB regulations were specifically meant to prohibit -- unintended and unfair advantages accorded SDB regular dealers who supply non-SDB product.

The current SDB regulations were specifically amended in 1988 to overcome the very thing that the proposed SDB joint venture would now permit.

The initial SDB regulations promulgated by DoD did permit SDB regular dealers to provide products of any business concern, including non-disadvantaged manufacturers. In December 1988, DoD proposed changes to its initial implementing regulations in order to require SDB regular dealers to obtain product from SDB manufacturers. DoD explained in making these changes in 1988 that the initial implementing regulations had provided for unintended advantages to SDB regular dealers over SDB manufacturers and had not adequately fostered SDB manufacturers in DoD contracting. SDB regular dealers were free to provide product from non-disadvantaged manufacturers and still be eligible for the SDB price preference. In its Federal Register notice dated December 8, 1988 announcing the proposed revisions, DoD stated that:

Some reservations were voiced that these policies [permitting SDB regular dealers to provide product from non-disadvantaged manufacturers] could result in SDB dealers having an advantage over SDB manufacturers. It does not appear from the legislative history of the underlying statutes that Congress intended this result. Accordingly, in light of the growing concern over the erosion of the domestic industrial base and the need to foster and encourage growth of U.S.-based industries, a decision was made to seek public comments on proposed revisions to certain aspects of the procedures outlined above.

* * * * *

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... It is intended that the foregoing would place all SDB concerns on an even footing, foster the growth of SDB concerns, and assist in supporting the growth of a domestic industrial base.

53 Fed. Reg. 49577-49578. A copy of the complete Federal Register notice dated December 8, 1988 is attached hereto as Tab B.

The 1988 revisions to the initial SDB regulations were ultimately finalized and are reflected in the current regulations set forth in DFARS Part 219. See 48 C.F.R. §§ 219.502-2-70(a)(1)(ii), 219.508(d); 219.508-70; 219.7003; 252.219-7001(f)(2); 252.219-7002(c); 252.219-7006(d)(2). A copy of these regulations is attached hereto as Tab C. These existing regulatory provisions require that in order to take advantage of the SDB price preference, an SDB regular dealer must provide the product of an SDB manufacturer. These regulatory provisions also provide for waiver of this requirement in those instances in which the DoD contracting officer determines that no SDB manufacturer is available. In such instances, an SDB regular dealer will be permitted to provide the product of any domestic, non-disadvantaged small business manufacturer and still be eligible for the SDB price preference.

The proposed SDB joint venture rule would, in effect, provide for the same type of unfair advantages afforded SDB regular dealers that existed prior to DoD's modification of the initial regulations in 1988.

These unfair advantages would be most egregious in the petroleum refining industry. Disadvantaged manufacturers, like Barrett, entered the petroleum refining industry without the benefit of the huge profits generated during the allocations period (which permitted then-existing refineries to purchase their facilities and finance their own crude oil acquisitions). For such disadvantaged petroleum refiners, like Barrett, the cost of operations, including debt servicing and crude oil purchasing, is staggering. Much of the SDB price preference paid to such SDB manufacturers is used just to compensate for this severe financial disadvantage. Further, any profit from operations resulting from the SDB price premium must be used by such manufacturers to re-invest in their business by acquiring the capital assets necessary to become more competitive.

In contrast, an SDB regular dealer in the petroleum industry will have an unfair advantage over an SDB refiner under the proposed joint venture rule. Under the applicable regulations defining the requirements of regular dealers in petroleum products, the cost of operations to be borne by such an SDB

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regular dealer are minimal in comparison to those of an SDB refiner. See 41 C.F.R. § 50-201.101(a)(2)(vi). The SDB regular dealer will be able to enter into a joint venture with a non-disadvantaged small refiner in order to provide the product of that non-disadvantaged refiner. With little or no investment, an SDB regular dealer could form a joint venture under the proposed rule with a non-SDB refiner. The joint venture would then be permitted to supply the product of the non-SDB refiner and still take advantage of the DoD SDB price premium. The non-SDB refiner would be free to set its own price through an independent supply agreement for the petroleum products to be supplied to the joint venture and, thereby, control the earnings of the joint venture and retain at least a majority of the SDB price premium.

The petroleum refining industry is an industry which has traditionally been dominated almost exclusively by the largest of the large businesses. By providing SDB regular dealers in the petroleum industry unfair advantages over SDB manufacturer/refiners, the petroleum industry will almost certainly remain closed to further minority participation at the manufacturer/refiner level. What will be left, at best, will be nothing more than SDB regular dealers acting as fronts for non-disadvantaged small and large refiners.

Since the beginning of the DoD SDB Program, DFSC has argued that, given the significant dollar amounts involved in its bulk fuels procurements, permitting SDB regular dealers to provide product from non-SDB refiners would encourage non-SDB refiners to not offer directly to DoD but through a multitude of SDB regular dealers created solely for the purpose of obtaining the benefits of the SDB price premium. If the proposed SDB joint venture rule is adopted, the large percentage of contract awards currently made by DFSC to non-disadvantaged small refiners will be replaced by contract awards to SDB joint ventures with SDB regular dealers being supplied by those same non-disadvantaged small refiners. At the same time, the few existing SDB refiners will be driven out of business.

In a recent letter to Congress in June 1992 in connection with the Defense Authorization Act for FY 1993, the Acting Deputy Commander of DFSC again explained the reason for the requirement that SDB regular dealers provide product of SDB manufacturers. He explained that:

...it would be inappropriate to pay the premium to SDB dealers who did not use SDB manufacturers as the source of product. This would result in greatly increased premiums, with the benefit not going to SDB manufacturers, but to small business manufacturers acting as subcontractors. This would diminish the

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ability of the SDB program to develop SDB manufacturers.

A copy of DFSC's June 1992 letter is attached hereto as Tab D.

DFSC's June 1992 letter goes on to state that the statistics indicate that application of the DoD SDB Program in the petroleum refining industry has had no adverse impact on non-disadvantaged small business refiners. DFSC states that the statistics for 1991 indicate that approximately 37% of the contract awards made by DFSC went to small business refiners, with approximately 9% of those awards going to SDBs.

Based on the above, there exists no legitimate policy reason why DoD should extend the benefits of the SDB Program to non-disadvantaged small business manufacturers through the use of the proposed SDB joint venture rule. Such an extension to such non-disadvantaged manufacturers would be contrary to the existing SDB regulations and detrimental to the development of SDB manufacturers.

If The Proposed SDB Joint Venture Rule
Goes Forward It Should Be Amended To Be In
Line With The Similar Rule In The 8(a) Program

The proposed SDB joint venture rule appears to be patterned after a similar rule applicable to the Small Business Administration's 8(a) Program. However, the proposed SDB joint venture rule omits key provisions contained in the 8(a) joint venture rule that help safeguard against potential abuses. The 8(a) joint venture rule is set forth in 13 C.F.R. § 124.321. A copy of the 8(a) joint venture rule is attached hereto as Tab E.

The 8(a) joint venture rule sets forth criteria for when a joint venture is appropriate and requires that an 8(a) concern must obtain the approval of SBA before entering into an 8(a) joint venture with another small business concern whether or not that other concern is an 8(a) participant. In 13 C.F.R. § 124.321(a), the 8(a) joint venture rule states that a joint venture:

...is permissible only when the 8(a) concern lacks the necessary capacity to perform the contract on its own, and when the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern.

13 C.F.R. § 124.321(a). (Emphasis supplied.) See also 13 C.F.R. § 124.321(d)(1) (which requires that the 8(a) joint venture agreement "must be approved in advance of contract award" by SBA). (Emphasis supplied.)

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No such similar provisions appear in the proposed SDB joint venture rule. No criteria is included in the proposed SDB joint venture rule concerning when an SDB joint venture is permissible. The proposed rule should contain criteria similar to that set forth in the 8(a) joint venture rule regarding when such a joint venture is appropriate. Nor is there any provision in the proposed SDB joint venture rule that even requires approval by DoD. The proposed SDB joint venture rule provides only the option of requesting a copy of the signed joint venture agreement if the DoD contracting officer decides to do so. However, even then, there is no requirement at all for any approval or disapproval by DoD of the joint venture agreement prior to or after contract award. The proposed SDB joint venture should be amended to require both submission of and approval of any joint venture agreement prior to contract award based on criteria set forth in the rule as to the appropriateness of an SDB joint venture.

Conclusion

Barrett believes that the proposed SDB joint venture rule should not be further pursued since it is contrary to both Congressional intent and existing regulations applicable to the DoD SDB Program. If DoD decides to go forward with the proposed SDB joint venture rule, Barrett believes that, at a minimum, the proposed rule be amended to (1) require that the SDB joint ventures be required to provide product of SDB manufacturers consistent with the existing SDB regulations; (2) include criteria concerning when such joint ventures are permissible (similar to that set forth in the 8(a) joint venture rule); and (3) require both the submission of and approval of any such joint venture agreement prior to contract award.

Barrett appreciates the opportunity to comment on the proposed SDB joint venture rule. Barrett would appreciate being notified of any further action that DoD might take regarding this proposed rule.

Sincerely,



Ron R. Hutchinson
Attorney for Barrett Refining
Corporation

Enclosures

cc: Mr. John A. Barrett, Jr.
Honorable Sam Nunn, Chairman, Senate Armed Services
Honorable Ron Dellums, Chairman, House Armed Services

Tab A

102D CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
102-966

NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 1993

CONFERENCE REPORT

TO ACCOMPANY

H.R. 5006



OCTOBER 1, 1992.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1992

59-624

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revision.

provision (sec. 710) that in consultation with the s, to study the feasibility demonstration project to risk contract.
revision.

*policy for the uniformed provision (sec. 703) that garding the current and e system.
revision.
endment.*

contracting for managed defense health care system government and military lled programs for health one concerned, however, of the layers of federal, n contracts that include ferent plan to review the ds would be developed in ity. Accordingly, the con se would start to review udget hearings.

se Authorization Act for 102-190) directed the De DOD health care system e committees. Section 733 tions of the personnel in zation review, an evalu eviewers have no financial the adequacy of the exist

and report are expected to he Department of Defense osed regulations aimed at and related areas of con

ent of Defense to develop te the delivery of quality nation among health care program. The standards that the reviewing profes

sionals are qualified to perform utilization review and managed care activities, and are licensed and competent in the area of care needed by the consumer.

Such standards should include a requirement that neither the providers nor any reviewing professional or agent have any financial incentive in the outcome of the prescribed treatment methodology followed.

Partial hospitalization under CHAMPUS

The conferees believe it is critical that a wide range of mental health options be available to CHAMPUS beneficiaries, so that services can be received in the most appropriate and cost-effective setting.

The conferees believe that partial hospitalization is an important benefit to bridge the transition from inpatient to outpatient care in order to ensure that there is no disruption in the continuity of care for beneficiaries. The conferees intend to continue to closely monitor the Department of Defense implementation of this program, including the determination of reasonable reimbursement rates.

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

LEGISLATIVE PROVISIONS

LEGISLATIVE PROVISIONS ADOPTED

Codification and amendments to section 1207 (sec. 801)

The House bill contained a provision (sec. 801) that would extend the five percent goal program for the award of DOD contracts and subcontracts to small disadvantaged businesses, historically Black colleges and universities, and minority institutions through fiscal year 2000 (section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661)). In addition, this provision of law would be codified as section 2323 of title 10, United States Code.

The Senate amendment contained a provision (sec. 814) that would extend the program through fiscal year 2000 and require the establishment of a process to review claims that the use of SDB set-asides has caused an industry category to bear a disproportionate share of the progress toward the goal.

The Senate recedes with a technical amendment.

The conferees agree to consolidate all section 1207-related provisions into a single section. The additional codified provisions are: (1) section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 (Public Law 100-180); and (2) section 832 of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189).

Provisions relating to small businesses and small disadvantaged businesses (sec. 802)

The House bill contained a provision (sec. 802) that would: (1) apply the "non-manufacturer rule" to the program established by

section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661); and (2) require the Secretary of Defense to issue regulations to ensure prime contractors comply with existing subcontracting requirements and make subcontracting plans a factor in the contract award process.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

The Defense Department has advised the conferees that it has developed a proposed regulation concerning the non-manufacturer rule. However, DOD has delayed issuance of this rule at the request of the Small Business Administration, which also intends to publish a rule on this subject. The conferees direct the Secretary of Defense to immediately issue a proposed regulation for comment on the non-manufacturer rule.

The conferees are concerned that subcontract awards by DOD prime contractors to small business concerns (including small disadvantaged businesses) declined 5.3 percent in fiscal year 1991 compared to the preceding year. The regulations required by this provision are intended to ensure that this decline does not become a trend and that the Department and its prime contractors enforce and comply with existing subcontracting plan requirements.

The conferees direct the Secretary to conduct a prompt review of DOD and prime contractor efforts to increase subcontract awards to small businesses and small disadvantaged businesses and to propose additional strategies to increase such awards. The results of this review should be reported to the Committees on Armed Services of the Senate and House of Representatives by April 1, 1993.

Under current law (section 806 of the National Defense Authorization Act of Fiscal Years 1988 and 1989 (Public Law 100-180)), the Secretary is required to make the administration of small business subcontracting plans a factor in the evaluation of the performance of contracting officials. The conferees direct the Secretary to take the appropriate steps to ensure that this requirement is fully enforced.

Funding for defense research by historically Black colleges and universities and minority institutions (HBCU/MI) (sec. 803)

The Senate amendment contained a provision (sec. 814) that would authorize \$15.0 million for the HBCU/MI infrastructure assistance program established in section 832 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510).

The House bill contained no similar provision.

The House recedes.

Small Business Administration certificate of competency program (sec. 804)

The Senate amendment contained a provision (sec. 811) that would modify the Small Business Administration (SBA) certificate of competency program as it affects the defense acquisition process.

The House bill contained no similar provision.

The House recedes with an amendment that would require: (1) DOD contract solicitations to advise small businesses of their right to request the Small Business Administration to review a contract

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Tab B

depreciation and noncurrent deferred federal income taxes attributable to total telecommunications plant as reported in §38.011(a)(7).
 [FR Doc. 88-28130 Filed 12-7-88; 8:45 am]
 BILLING CODE 6712-01-44

DEPARTMENT OF DEFENSE

48 CFR Parts 219, 226, and 252

Department of Defense Federal Acquisition Regulation Supplement; Implementation of Section 1207 of Pub. L. 99-661 and Section 806 of Pub. L. 100-180; Contracting With Small Disadvantaged Business Concerns

AGENCY: Department of Defense (DoD).
ACTION: Proposed rule and Request for Public Comments.

SUMMARY: The Department of Defense is proposing changes to Parts 219, 226 and 252 of the DoD FAR Supplement (DFARS) implementing section 1207 of Pub. L. 99-661 and section 806 of Pub. L. 100-180. Sections 219.001, 226.7003 and 252.219-7007(d) are being amended to provide that, in unrestricted procurements, Historically Black Colleges and Universities (HBCUs) and Minority Institutions (MIs) will be given the same evaluation preference as that accorded to small disadvantaged business (SDB) concerns. Sections 219.7000 and 252.219-7007 are being modified to provide that the evaluation preference will not be applied in acquisitions over the dollar threshold for the Trade Agreements Act only where the low offeror is offering an eligible end product or where the application would otherwise violate an agreement or memorandum of understanding with a foreign government. Sections 219.508, 219.7002, 252.219-7007, and 252.219-7012 are being modified to provide that, in an unrestricted procurement, an SDB regular dealer, in order qualify for the evaluation preference, must provide the product of an SDB concern if available; in a partial small business set-aside, in order to be eligible for preferential consideration, an SDB dealer or manufacturer must provide the product of an SDB concern, if available. Section 219.001, 219.502(S-70), 219.502-72, 219.508, and 252.219-7012 are being amended to assist disadvantaged business concerns in transitioning to large business status and in becoming viable business entities.

DATE: Comments should be received on or before January 9, 1989 to ensure their consideration in formulating a final rule. Please cite DAR Case 88.009 in all correspondence related to this issue.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD(P)DARS, c/o OASD(P&L) (M&RS), Room 3D139, The Pentagon, Washington, DC 20301-3082.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, telephone (202) 407-7286.

SUPPLEMENTARY INFORMATION:

A. Background

On June 6, 1988, DoD published a final and an interim rule with request for public comments (53 FR 20626) substantially implementing the requirements of section 1207 of Pub. L. 99-661 and section 806 of Pub. L. 100-180 that established an objective that five percent of total combined DoD obligations (i.e., procurement, research, development, test and evaluation; construction; and operation and maintenance) for contracts and subcontracts awarded during FY 1987 through FY 1989 be entered into with SDB concerns, HBCUs and MIs. Section 844 of Pub. L. 100-458 extended this objective through FY 1990.

During the development of the final rule implementing sections 1207 and 806, as part of the public comment period, several issues were raised that were considered beyond the scope of that rulemaking effort and were deferred for full public consideration and comment. Four of these issues have been consolidated into the present proposed rulemaking.

DFARS coverage has been added to afford HBCUs and MIs the same evaluation preference as that accorded to SDBs under the procedures at DFARS 219.7000. This change is proposed in recognition that in certain procurements (e.g., solicitations involving research and studies) HBCUs and MIs may very well compete with SDBs and other business entities for award. Since SDBs, HBCUs and MIs are defined equally as "1207(a) entities" for the purposes of the preference procedures of section 1207 of Pub. L. 99-661, the revisions will ensure that they are treated equally for evaluation purposes consistent with that statute. (See revisions at 219.7001, 226.7003 and 252.219-7007(d).)

Revised DFARS coverage is proposed with respect to the application of the evaluation preference to acquisitions under the Trade Agreements Act which equal or exceed the dollar threshold referenced in FAR 25.402. Under the proposed revision, the evaluation preference will be applied unless there

is an offer of an eligible product which is otherwise low (before application of the evaluation preference). Thus, where the solicitation equals or exceeds the threshold of the Trade Agreements Act and the low offer is an offer of an eligible product, then the evaluation preference will not be applied. However, when the offer of the eligible product is not low, even where the dollar amount of the solicitation equals or exceeds the threshold of the Trade Agreements Act, the evaluation preference will be applied to all non-SDB offers. Application of the evaluation preference to the offer of an eligible product when it is not the low offer does not operate to the detriment of that offeror. It does, however, enhance the opportunities for SDBs even when the acquisition equals or exceeds the dollar threshold of the Trade Agreements Act and either there is no offer of an eligible product or the offer of the eligible product is not low. (See revision at 219.7000(a) and 252.219-7007(b).)

Revised DFARS coverage is proposed to require that, in order to be eligible for the evaluation preference under 219.7000, an SDB dealer must provide the product of an SDB manufacturer if one is available who can meet the requirements of the solicitation. Under the current coverage, to be entitled to the evaluation preference described at 219.7000, SDB concerns other than regular dealers must agree to the subcontracting limitations identified at 252.219-7007(c). An SDB dealer, on the other hand, may provide the product of any business concern (i.e., another SDB, a small business or a large business) and still be eligible for the evaluation preference. A similar situation exists under the preferential consideration given to SDBs under the partial small business set-aside procedures at 252.219-7010. Under those procedures, an award to an SDB concern on the set-aside portion may exceed the award price on the non set-aside portion by up to ten percent (10%). An SDB manufacturer or regular dealer need only provide the product of a small business concern in order to be granted this preferential consideration.

Some reservations were voiced that these policies could result in SDB dealers having an advantage over SDB manufacturers. It does not appear from the legislative history of the underlying statutes that Congress intended this result. Accordingly, in light of the growing concern over the erosion of the domestic industrial base and the need to foster and encourage the growth of U.S.-based industries, a decision was made to seek public comments on proposed

revisions to certain aspects of the procedures outlined above.

Section 252.219-7007 is revised to state that in order to be entitled to an evaluation preference in an unrestricted procurement, SDB dealers would have to provide a product manufactured or produced by an SDB concern. However, in the event the contracting officer, in coordination with the activity small business specialist, determines that there are no SDB manufacturers available who can meet the requirements of the solicitation, then the dealer can provide the product of either a small or a large business concern and still obtain the evaluation preference.

Section 252.219-7010 is revised to state that, to be eligible for preferential consideration in a partial small business set-aside, both an SDB manufacturer and an SDB dealer would have to provide an end item manufactured or produced by an SDB concern. In the event there is a determination that there are no SDB manufacturers available who can meet the requirements of the solicitation, the SDB manufacturer or dealer need only provide the product of a small business to be entitled to preferential consideration. It is intended that the foregoing would place all SDB concerns, dealers and manufacturers, on an even footing, foster the growth of SDB concerns, and assist in supporting the growth of a domestic industrial base. (See revisions at 219.508(d)(S-72), 219.7002, 252.219-7007(c).)

DFARS coverage is proposed with respect to follow-on procurements in order to assist disadvantaged business firms in transitioning to large business status and in becoming viable business entities. Under the proposed revisions, follow-on requirements to those procured by the contracting office under the existing contract on an unrestricted basis are to be procured under the successor contract on the basis of an unrestricted competition or by partial small business set-aside procedures, where the incumbent contractor certifies that it (i) is a "disadvantaged business concern" as defined in DFARS 219.001, (ii) derived contract revenues under the existing contract representing at least one-third of its total revenues during the performance period of that contract, and (iii) desires to participate in a follow-on acquisition.

In addition, a new definition in DFARS 219.001, in essence, will define a "disadvantaged business concern" as a minority-owned business enterprise which meets U.S. Small Business Administration criteria for social and economic disadvantaged business

status, but which no longer qualifies as a "small business". Thus, by providing for an unrestricted competition or partial small business set-aside when the circumstances in (i) through (iii) above exist, disadvantaged businesses which do not qualify as small businesses will not be denied an opportunity to compete for requirements which represent a large portion of their business base, as would be the case if the successor requirements were reserved for exclusive small or small disadvantaged business participation. However, in keeping with the requirements of section 806(b)(7) of Pub. L. 100-180 (which requires that DoD maintain the number and dollar value of contracts set-aside for small business or reserved under the 8(a) Program), the coverage will not apply to situations where award of the predecessor contract was made as the result of total small business or small disadvantaged business set-asides, or 8(a) Program reservations. (See revisions at 219.001, 219.502(S-70), 219.502-72(b), 219.508(S-74), and 252.219-7012).

B. Regulatory Flexibility Act

The proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, et seq. An Initial Regulatory Flexibility Analysis has therefore been deemed necessary and will be provided to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Interested parties desiring to obtain a copy of the Analysis may contact the Executive Secretary of the DAR Council. Comments received from the public will be considered in drafting a final rule and in performing a Final Regulatory Flexibility Analysis.

Comments from small entities concerning the affected DFAR Subparts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DAR Case 88-610D in correspondence.

C. Paperwork Reduction Act

The proposed rule does not impose information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq., and OMB approval of the proposed rule is not required pursuant to 5 CFR Part 1320.

List of Subjects in 48 CFR Parts 219, 226 and 252

Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 219, 226 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 219, 226 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 500.35 and DoD FAR Supplement 201.301.

PART 219—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNs

2. Section 219.001 is amended by adding a definition of "Disadvantaged Business Concerns" (DBC), alphabetically, as follows:

219.001 Definitions.

"Disadvantaged business concern", as used in this Part, means a business concern, including mass media, owned and controlled by individuals who are both socially and economically disadvantaged, as defined in regulations prescribed by the Small Business Administration (SBA) at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals, and which concern is not also a small business concern.

219.502-2 [Amended]

3. Section 219.502-2 is amended by adding paragraph (S-70) to read as follows.

(S-70) Total Set-Aside Exception Regarding Incumbent Disadvantaged Business Concerns.

(1) Notwithstanding FAR 19.502-2, a follow-on procurement for supplies or services (except construction or A&E), acquired by the contracting office under the existing contract on the basis of an unrestricted competition, shall not be totally set-aside for exclusive small business participation when the contracting officer determines based upon a written certification by the incumbent contractor, that the contractor—

(i) Is a disadvantaged business concern as defined in 219.001;

(ii) Derived contract revenues under the existing contract which represent at least one-third of the contractor's total revenues derived during the performance period of that contract; and

(iii) Desires to submit an offer in response to a follow-on solicitation.

(2) After learning of a follow-on requirement, the contracting officer shall notify the incumbent contractor of the requirement and permit the concern a period of ten (10) calendar days, or such longer period as the contracting officer may allow, to furnish a certification under the clause at 252.219-7012 together with any supporting documentation which the contracting officer deems necessary to verify the concern's status. Notification to the incumbent contractor need not be made when—

(i) A decision has been made to procure the follow-on requirement on an unrestricted basis, or through use of partial small business set-aside procedures under 219.502-3(S-70) or FAR 19.502-3; or

(ii) The contracting officer has information sufficient to conclude that the incumbent contractor is not a disadvantaged business concern as defined in 219.001.

(iii) The contracting officer shall accept the contractor's self-certification of its status as a disadvantaged business concern unless the contracting officer has reason to question that status. The contracting officer or the SBA may challenge the contractor's status as a disadvantaged business concern in accordance with the procedures at 19.302(S-70).

(3) When the contracting officer determines that the circumstances in (S-70)(1) above exist, the follow-on procurement shall be conducted either on an unrestricted basis or by using partial small business set-aside procedures under 219.502-3(S-70) or FAR 19.502-3 in the order of precedence set forth in 219.504(b) (5) and (6).

4. Section 219.502-72 is amended by adding paragraph (6) to paragraph (b), to read as follows:

219.502-72 Total SDB set-asides.

(b) •••

(6) A determination has been made in accordance with 219.502-2(S-70)(a) to conduct the procurement either on an unrestricted basis or by using partial small business set-aside procedures.

5. Section 219.508 is amended by redesignating the existing paragraph (S-72) as (S-72)(1); by adding paragraph (S-72)(2); and by adding paragraph (S-74) to read as follows:

219.508 Solicitation provisions and contract clauses.

(S-72)(1) •••

(S-72)(2) The contracting officer shall insert the clause with its Alternate I

when the contracting officer determines, in coordination with the contracting activity's SADBUS, that there are no SDB manufacturers available that can meet the requirements of the solicitation.

(S-74) The contracting officer shall insert the clause at 252.219-7012, Disadvantaged Business Concerns—Notice of Follow-On Procurement, in all solicitations and contracts when the procurement is conducted on an unrestricted basis.

6. Section 219.7000 is revised to read as follows:

219.7000 Policy.

(a) In furtherance of the Department of Defense objectives and initiatives undertaken to award acquisitions in all industrial categories in which small disadvantaged businesses (SDBs) have not dominated and to meet the five percent goal for SDBs established by section 1207 of Pub. L. 99-661 and section 808 of Pub. L. 100-180 (see 19.201), offers from SDB concerns shall be given and evaluation preference in accordance with the procedures of this subpart. The evaluation preference shall only be used in competitive acquisitions (except as provided in (b) below) where award is based on price and price related factors. However, in no event may award be made at a price which exceeds fair market price (see FAR 19.808-2) by more than 10 percent.

(1) The evaluation preference shall not apply when using—

- (i) Small purchase procedures;
- (ii) Total SDB set-asides;
- (iii) Partial set-asides for LSA concerns;

(iv) Partial small business set-asides;

(v) Total small business set-asides.

(2) The evaluation preference shall not be applied to—

(i) Otherwise low offers of eligible products under the Trade Agreements Act as defined in DFARS 25.401 when the acquisition equals or exceeds the dollar threshold stated in FAR 25.402 for qualifying country and products as defined in DFARS 25.001; or

(ii) Where the application would be inconsistent with a Memorandum of Understanding or any other international agreement with a foreign government (see Appendix T).

(b) Subject to the exceptions in (a) above, the evaluation preference may also be used in other competitive acquisitions, at the discretion of the source selection authority, when (1) SDBs are expected to possess the requisite qualification, consistent with the demands of the acquisition (e.g., see FAR 35.007 with regard to technical

qualification of sources) and, (2) award price will not exceed fair market price by more than 10 percent.

7. Section 219.7001 is amended by adding a sentence following the first sentence to read as follows:

219.7001 Procedures.

••• "Offers submitted by HBCUs/MIs shall be evaluated as though they were from SDB concerns (see 252.219-7007(d))." •••

8. Section 219.7002 is amended by adding a sentence after the existing text as follows:

219.7002 Contract clause.

••• The contracting officer shall insert the clause with its Alternate I when the contracting officer determines, in coordination with the contracting activity's SADBUS, that there are no SDB manufacturers available that can meet the requirements of the solicitations.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

9. Section 226.7003 is revised to read as follows:

226.7003 General policy.

In furtherance of the Government policy of placing a fair proportion of its acquisitions with HBCUs, MIs, and SDBs, section 1207 of Pub. L 99-661 and section 808 of Pub. L 100-180 established an objective for the Department of Defense of awarding a combined total of five percent of its total contract dollars during each of fiscal years 1987-89 to HBCUs, MIs and SDBs (see 219.201) and of maximizing the number of such entities participating in Defense prime contracts and subcontracts. Executive Order 12320 also contains additional guidance concerning HBCUs. It is the policy of the Department of Defense to strive to meet these objectives through the enhanced use of outreach efforts, technical assistance programs, and the special authorities conveyed by these laws (e.g., through a total set-aside for HBCUs and MIs to acquire research and studies normally acquired from Higher Education Institutions (HEIs). With regard to technical assistance programs, it is the Department's policy to provide HBCUs and MIs, technical assistance, to include information about the Department HBCU and MI program, advice about acquisition procedures, instructions on preparation of proposal, and such other assistance as is consistent with the Department's mission. In the event an HBCU or MI submits an offer under an unrestricted

acquisition that offers an evaluation preference for SDBs, the HBCU or MI offer shall be evaluated as if it had been submitted by an SDB concern (see 252.219-7007(d)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

10. Section 252.219-7007 is revised to read as follows:

252.219-7007 Notice of evaluation preference for small disadvantaged business (SDB) concerns—[unrestricted]

As prescribed in 219.7007(a), insert the following clause:

Notice Evaluation Preference for Small Disadvantaged Business (SDB) Concerns (Date) (Unrestricted).

(a) **Definition.** (1) The term "small disadvantaged business (SDB) concern", as used in this clause, has the meaning set forth in the clause entitled Small Disadvantaged Business Concern Representation (DoD FAR Supplement Deviation).

(b) **Evaluation.** (2) After all other evaluation factors described in this solicitation are applied, and except as set forth in (b)(2) below, offers will be evaluated by adding a factor of ten percent (10%) to offers from concerns that are not SDB concerns and to offers from those SDB concerns which elect to waive the SDB evaluation preference (see paragraph (c) below) by checking the box below. However, in no event may award to made to an SDB concern at a price which exceeds fair market price (as determined under FAR 19.806-2) by more than ten percent (10%).

The SDB offeror requests that the evaluation preference in subparagraph (b)(1) above not be given to this offer.

(3) The evaluation factor desirable in subparagraph (a)(1) above shall not be applied to (i) otherwise low offers of eligible products under the Trade Agreements Act as defined in DFARS 25.401 when the acquisition equals or exceeds the dollar threshold stated in FAR 25.402, or qualifying country end products as defined in DFARS 25.011; or (ii) where the application would be inconsistent with a Memorandum of Understanding or any other international agreement with a foreign government (see Appendix T of the DoD FAR Supplement).

(c) **Agreement.** (1) By submission of an offer and execution of a contract, the SDB Offeror/Contractor (except a regular dealer) who did not waive the evaluation preference by checking the box in paragraph (b) above agrees that in performance of the contract in the case of a contract for—

(i) **Services (Except Construction).** At least fifty (50%) of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

(ii) **Supplies.** The concern shall perform work for at least fifty percent (50%) of the cost of manufacturing the supplies, not including the cost of materials.

(iii) **General Construction.** The concern will perform at least fifteen percent (15%) of the cost of the contract, not including the cost of materials, with its own employees.

(iv) **Construction be special trade contractors.** The concern will perform at least twenty-five percent (25%) of the cost of the contract, not including the cost of materials, with its own employees.

An SDB regular dealer submitting an offer in its own name, who did not waive the evaluation preference by checking the box in paragraph (b) above, agrees to furnish, in performing this contract, only end items manufactured or produced by SDB concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However this requirement does not apply in connection with construction or service contracts.

(d) **HBCU/MI offer.** In the event an HBCU/MI as defined at 228.7002 submits to the contracting officer, upon request, a certification as to its HBCU/MI status. (End of clause)

Alternate I (Date)

If a determination has been made in accordance with 219.7002 that there are not SDB manufacturers available who can meet the requirements of the solicitation, delete paragraph (c)(2) of the basic clause.

11. Section 252.219-7010 is amended by substituting the word "[Date]" in lieu of the date "(FEB 1988)": by adding paragraph (4) to paragraph (c) of the clause and by adding Alternate I to read as follows:

252.219-7010 Notice of partial small business set-aside with preferential consideration for small disadvantaged business (SDB) concerns.

As prescribed at 219.508(S-72), insert the following clause:

Notice of Partial Small Business Set-Aside With Preferential Consideration for Small Disadvantaged Business (SDB) Concerns (FEB 1988)

(c) Agreement.

(4) In order to be entitled to preferential consideration, an SDB manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by SDB concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. However, this requirement does not apply in connection with construction or service contracts. (End of clause)

Alternate I (Date)

If a determination has been made in accordance with 219.508(S-72) that there are

no SDB manufacturers available who can meet the requirements of the solicitation, insert the following paragraph (c)(4) in lieu of paragraph (c)(4) of the basic clause:

(c)(4) In order to be entitled to preferential consideration, an SDB manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing this contract, only end items manufactured or produced by small business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. However this requirement does not apply in connection with construction or service contracts.

12. Section 252.219-7012 is added to read as follows:

252.219-7012 Disadvantaged business concerns—notice of follow-on procurement

As prescribed in 219.508(S-74), insert the following clause:

Disadvantaged Business Concerns—Notice of Following Procurement (Date)

(a) **Definition.** As used in this clause, this term "disadvantaged business concern" means a business concern, including mass media, owned and controlled by individuals who are both socially and economically disadvantaged, as defined in regulations prescribed by the Small Business Administration at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals, which concern is not also a small business concern.

(b) DoD FAR Supplement 219.502(S-70)(a) provides that a follow-on procurement for supplies or services (except construction or A&E), acquired on the basis of an unrestricted competition, shall not be totally set-aside for exclusive small business participation when the contracting officer determines, based upon a written certification by the incumbent contractor, that contractor (1) is a disadvantaged business concern (as defined in paragraph (a) above, (2) derived contract revenues under the existing contract which represent at least one-third of the contractor's total revenues derived during the performance period of that contract, and (3) desires to submit an offer in response to a follow-on solicitation.

(c) If the Contractor meets the criteria in paragraph (b)(1) and (2) of this clause and desires to participate in a follow-on procurement, the Contractor agrees that it shall, within ten (10) calendar days (or such longer period as the Contracting Officer shall allow after receipt of notice by the Contracting Officer of a follow-on requirement)—

(1) Certify in writing that it meets the criteria in paragraph (b)(1) and (2) above, and

(2) Provide such supporting documentation as the Contracting Officer may require to verify the contractor's status.

Tab C

219.502-2-70 Total set-asides for small disadvantaged business concerns.

(a) Except as provided in paragraph (b), the contracting officer shall set aside an acquisition for small disadvantaged businesses when there is a reasonable expectation that—

(1) Offers will be received from at least two responsible small disadvantaged business (SDB) concerns who—

(i) Can comply with the FAR 52.219-14 limitations on subcontracting; or

(ii) In the case of SDB regular dealers, will provide the supplies of SDBs (except as provided in Alternate I of the clause at 252.219-7002, Notice of Small Disadvantaged Business Set-Aside).

(2) Award will be made at not more than ten percent above fair market price; and

(3) Scientific and/or technological talent consistent with the demands of the acquisition will be offered.

(b) Do not set aside acquisitions for SDBs when—

(1) The product or service has been successfully acquired as a small business set-aside (see FAR 19.501(g));

(2) The acquisition is for construction, including maintenance and repairs, and is under \$2 million, or is for dredging under \$1 million;

(3) The acquisition is for architect-engineer services or construction design for military construction projects, without regard to dollar value;

(4) The acquisition is reserved for the 8(a) program;

(5) The acquisition is processed under small purchase procedures; or

(6) The acquisition is for commissary or exchange resale items.

(c) See 205.207(d) for information on Commerce Business Daily synopsis.

219.508 Solicitation provisions and contract clauses.

(d) Use the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business (SDB) Concerns, instead of the clause in FAR 52.219-7, Notice of Partial Small Business Set-Aside. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

(e) Use the clause at 52.219-14, Limitations on Subcontracting, also in small disadvantaged business set-asides.

219.508-70 Solicitation provisions and contract clauses.

Use the clause at 252.219-7002, Notice of Small Disadvantaged Business Set-Aside, in solicitations and contracts for small disadvantaged business set-asides. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

219.7003 Solicitation provisions and contract clauses.

Use the clause at 252.219-7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations and contracts involving the evaluation preference, except those which include the clause at 252.219-7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

252.219-7001 Notice of partial small business set-aside with preferential consideration for small disadvantaged business concerns.

As prescribed in 219.508(d), use the following clause:

NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE WITH PREFERENTIAL CONSIDERATION FOR SMALL DISADVANTAGED BUSINESS CONCERN (DEC. 1991)

(a) Definitions.

Labor surplus area, as used in this clause, means a geographical area identified by the Department of Labor as an area of labor surplus.

Labor surplus area concern, as used in this clause, means a concern that, together with its first tier subcontractors, will perform substantially in labor surplus areas.

Perform substantially in labor surplus areas, as used in this clause, means that the costs incurred under the contract on account of manufacturing, production, and performance of services in labor surplus areas exceed 50 percent of the contract price.

Small business concern, as used in this clause, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

Small disadvantaged business concern, as used in this clause, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(b) General. A portion of this requirement, identified elsewhere in this solicitation, has been set aside for award to one or more small business concerns. After offers for the non-set-aside portion have been evaluated, negotiations will be conducted for the set-aside portion.

(1) Offers on the non-set-aside portion will be evaluated and award made in accordance with the other provisions of this solicitation.

(2) The set-aside portion will be negotiated, in accordance with this clause, with small business concerns which submitted offers on the non-set-aside portion.

(c) *Award of the set-aside portion.* (1) Small business offerors on the non-set-aside portion will be selected for negotiation of the set-aside portion based on their standing—first in terms of group and then in terms of lowest responsive offer on the non-set-aside portion.

(i) Group 1—Small disadvantaged business concerns which are also labor surplus area concerns.

(ii) Group 2—Small business concerns which are also labor surplus area concerns.

(iii) Group 3—Other small disadvantaged business concerns.

(iv) Group 4—Other small business concerns.

(2) The set-aside portion will be awarded at the highest unit price(s) in the contract(s) for the non-set-aside portion, adjusted to reflect transportation and other costs appropriate for the selected contractor(s), except—

(i) Award of the set-aside portion to a small disadvantaged business concern will be at the lower of—

(A) The price offered by the concern on the non-set-aside portion; or

(B) A price that does not exceed the award price on the non-set-aside portion by more than ten percent.

(ii) When award under the set-aside portion is to a concern offering a nonqualifying country end product and the highest unit price in the contract(s) is for a domestic or qualifying country end product, the set-aside price will be the higher of—

(A) The highest award price for a nonqualifying country end product under the nonset-aside; or

(B) A price which, when adjusted by the Buy American Act evaluation factor, would equal the highest unit price in the contract(s).

(iii) When award under the set-aside portion is to a concern offering a domestic end product and the highest unit price in the contract(s) is for a nonqualifying country end product which was evaluated using the Buy American Act evaluation factor, the set-aside price will be awarded at the evaluated price of the non-qualifying country.

(iv) When award under the set-aside portion is to a concern offering a domestic end product and the highest unit price in the contract(s) is for a nonqualifying country end product which was evaluated without the Buy American Act factor—

(A) And award was made to a domestic or qualifying country offer at a price lower than the high contract price, the set-aside price will be the highest unit price in the contract(s).

(B) And award was not made to a domestic or qualifying country offer at a price lower than the high contract price, the set-aside price will be the lower of—

(1) The highest unit price under the contract(s) as adjusted by the Buy American Act evaluation factor; or

(2) The lowest offered price for a domestic or qualifying country end product which was not awarded under the nonset-aside.

(v) Where the Trade Agreements Act applies to the nonset-aside portion, offers of eligible products will be treated as if they were qualifying country end products.

(vi) Discount terms used in evaluation of the highest non-set-aside award price will apply to the set-aside award price.

(3) If negotiations are not successful for any part of the set-aside portion, the set-aside will be dissolved for that part and the requirement will be resolicited.

(d) *Token offers.* The Government reserves the right to not consider token offers or offers designed to secure an unfair advantage over other offerors eligible for the set-aside portion.

(e) *Eligibility for preference as a labor surplus area concern.* Small business or small disadvantaged business offerors which claim preference for the set-aside portion as a labor surplus area concern, must list the labor surplus area location(s) of offeror or first tier subcontractors, which account for more than 50 percent of the contract price.

Name of Company:

Street Address:

City/County:

State:

(f) Agreements.

(1) If awarded a contract as a small disadvantaged business-labor surplus area concern or as a small business-labor surplus area concern, the offeror—

(i) Will perform the contract, or cause it to be performed, substantially in areas classified as labor surplus areas.

(ii) If the contract is in excess of \$25,000, will submit a report to the Contracting Officer within 30 days after award that contains the following information—

(A) The dollar amount of the contract.

(B) Identification of each labor surplus area in which contract and subcontract performance is taking or will take place.

(C) The total costs incurred and to be incurred under the contract in each of the labor surplus areas by the contractor and first tier subcontractors.

(D) The total dollar amount attributable to performance in labor surplus areas.

(2) A manufacturer or regular dealer, which claims preference as a small disadvantaged business and submits an offer in its own name, agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(End of clause)

ALTERNATE I (DEC. 1991)

As prescribed in 219.508(d), substitute the following paragraph (f)(2) for paragraph (f)(2) of the basic clause:

(f)(2) A regular dealer, which claims preference as a small disadvantaged business and submits an offer in its own name, agrees to furnish in performing this contract only end items manufactured or produced by small business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

252.219-7002 Notice of small disadvantaged business set-aside.

As prescribed in 219.508-70, use the following clause:

NOTICE OF SMALL DISADVANTAGED BUSINESS SET-ASIDE (DEC. 1991)

(a) *Definition.* Small disadvantaged business concern, as used in this clause, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR Part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(b) *General.* Offers are solicited only from small disadvantaged business concerns. Offers received from concerns that are not small disadvantaged businesses are nonresponsive and will be rejected.

(c) *Agreement.* A small disadvantaged business manufacturer or regular dealer, which submits an offer in its own name, agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(End of clause)

ALTERNATE I (DEC. 1991)

As prescribed in 219.508-70, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) *Agreement.* A small disadvantaged business regular dealer submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small business concerns in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

252.219-7006 Notice of evaluation preference for small disadvantaged business concerns.

As prescribed in 219.7003, use the following clause:

NOTICE OF EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS CONCERNS (DEC. 1991)

(a) *Definitions.* *Historically black colleges and universities*, as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

Minority institutions, as used in this clause, means institutions meeting the requirements of paragraphs (3), (4), and (5) of section 312(b) of the Higher Education Act of 1965 (20 U.S.C. 1058). The term also means any nonprofit research institution that was an integral part of a historically black college or university before November 14, 1986.

Small disadvantaged business concern, as used in this clause, means a small business concern, owned and controlled by individuals who are both socially and economically disadvantaged, as defined by the Small Business Administration at 13 CFR part 124, the majority of earnings of which directly accrue to such individuals. This term also means a small business concern owned and controlled by an economically disadvantaged Indian tribe or Native Hawaiian organization which meets the requirements of 13 CFR 124.112 or 13 CFR 124.113, respectively.

(b) *Evaluation preference.* (1) Offers will be evaluated by adding a factor of ten percent to the price of all offers, except—

(i) Offers from small disadvantaged business concerns, which have not waived the preference;

(ii) Offers from historically black colleges and universities or minority institutions, which have not waived the preference;

(iii) Otherwise successful offers of—

(A) Eligible products under the Trade Agreements Act when the dollar threshold for application of the Act is exceeded;

(B) Qualifying country end products (as defined in the Defense Federal Acquisition Regulation Supplement clause at 252.225-7001, Buy American Act and Balance of Payments Program); and

(iv) Offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government.

(2) The ten percent factor will be applied on a line item by line item basis or to any group of items on which award may be made. Other evaluation factors described in the solicitation will be applied before application of the ten percent factor. The ten percent factor will not be applied if using the preference would cause the contract award to be made at a price which exceeds the fair market price by more than ten percent.

(c) *Waiver of evaluation preference.* A small disadvantaged business, historically black college or university, or minority institution offeror may elect to waive the preference, in which case the ten percent factor will be added to its offer for evaluation purposes. The agreements in paragraph (d) do not apply to offers which waive the preference.

Offeror elects to waive the preference

(d) *Agreements.* (1) A small disadvantaged business concern, historically black college or university, or minority institution offeror, which did not waive the preference, agrees that in performance of the contract, in the case of a contract for—

(i) Services, except construction, at least 50 percent of the cost of personnel for contract performance will be spent for employees of the concern.

(ii) Supplies, at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern.

(iii) General construction, at least 15 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern.

(iv) Construction by special trade contractors, at least 25 percent of the cost of the contract, excluding the cost of materials, will be performed by employees of the concern.

(2) A small disadvantaged business, historically black college or university, or minority institution regular dealer submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small disadvantaged business concerns, historically black colleges or universities, or minority institutions in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

(3) Upon request, a historically black college or university or minority institution offeror will provide the Contracting Officer evidence that it has been determined to be an HBCU or MI by the Secretary of Education.

(End of clause)

ALTERNATE I (DEC. 1991)

As prescribed in 219.7003, substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause:

(d)(2) A small disadvantaged business, historically black college or university, or minority institution regular dealer submitting an offer in its own name agrees to furnish in performing this contract only end items manufactured or produced by small business concerns, historically black colleges or universities, or minority institutions in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia.

Tab D



DEFENSE LOGISTICS AGENCY
DEFENSE FUEL SUPPLY CENTER
CAMERON STATION
ALEXANDRIA, VIRGINIA 22304-6160



IN REPLY
REFERRED TO DFSC-G

14 JUN 1992

Honorable Lloyd Bentsen
United States Senator
961 Federal Building
Austin, TX 78701

Dear Senator Bentsen:

This is in response to your letter of 29 May 1992 to Mr. G. C. Flessate, Staff Director, Congressional Affairs, Defense Logistics Agency, regarding the DoD Small Disadvantaged Business (SDB) program as it is applied in the bulk fuels purchases program. Your constituent is concerned with the requirement that a company participating in the SDB program must have an SDB source of product. Your inquiry was forwarded to the Defense Fuel Supply Center (DFSC) for direct response.

Section 1207 of Public Law 99-661 (1986) authorizes DoD to pay a price premium to SDBs not exceeding 10 percent of the fair market price. Under the regulations applicable to the bulk fuels program of DFSC, the source of the product must be an SDB manufacturer. The reason for this restriction is that the bulk fuels program is primarily a manufacturer's program; less than one percent of the volume is purchased from dealers. Since the bulk fuels program is primarily a manufacturer's program, it would be inappropriate to pay the premium to SDB dealers who did not use SDB manufacturers as the source of product. This would result in greatly increased premiums, with the benefit not going to SDB manufacturers, but to small business manufacturers acting as subcontractors. This would diminish the ability of the SDB program to develop SDB manufacturers.

The current SDB program in bulk fuels has been very effective in assisting SDB refineries in making sales to DoD, while not decreasing the sales from small business refineries. The majority of the product involved in DFSC's SDB program is JP-4 jet fuel. In 1988, prior to the SDB program, 24 percent of the DFSC purchases of JP-4 was from small business refineries, including 5 percent from SDBs. In 1991, 37 percent of the purchases was from small business refineries, including 9 percent from SDBs. Thus, both SDBs and small businesses have been able to increase their business with DoD since the SDB program was implemented.

DFSC-G PAGE 2
Honorable Lloyd Bentsen

In addition, your constituent is concerned about the responsibility of the SDB participants in the bulk fuel programs. The SDB program currently has the participation of several reliable contractors, although there have been a few SDB contractors in the past that had serious problems. These problems often were a result of the difficulties faced by companies, especially small companies, trying to enter the refinery business. Some SDB companies were unable to become profitable even with the subsidy of the 10 percent evaluation preference. The companies that had the most serious problems are no longer operating. DFSC is not having any serious problems with current SDB contractors.

Your constituent also alleges that participants in the program are improperly affiliated with large businesses. DFSC did challenge the SDB status of several companies on various grounds, including their relationships with large businesses. However, the Small Business Administration, the agency with jurisdiction to rule on these matters, confirmed the SDB status of the companies in all but one of these cases. In the one case in which the company was held not to be an SDB, the company restructured in order to meet the requirements for SDB status. DFSC continues to monitor the status of all of its contractors and will make appropriate challenges based on any new evidence found or submitted to DFSC.

I hope this is responsive to your constituent's concerns. A similar response has been provided to Representative Tom DeLay.

sincerely,


MICHAEL D. HOOTH
CAPTAIN, SC, USN
Acting Deputy Commander

Tab E

§ 124.321

shall so notify the SBA, specifying the reasons for the denial. This information shall be made a part of the contract file for the requirement.

(c) An 8(a) Participant selected by the SBA to perform or negotiate an 8(a) contract may request the SBA to protest the procuring agency's estimate of the fair market price for such contract pursuant to paragraph (b) of this section.

§ 124.321 Joint venture agreements.

(a) *Prerequisites for joint venture agreement.* If approved by the AA/MSB&COD or his/her designee, an 8(a) concern may enter into a joint venture agreement, as defined in § 124.100, with another small business concern, whether or not an 8(a) participant, for the purpose of performing a specific 8(a) contract. A joint venture agreement is permissible only when the 8(a) concern lacks the necessary capacity to perform the contract on its own, and when the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern.

(b) *Size limitations.* Except for certain Program Participants owned and controlled by Indian tribes, an 8(a) concern entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) subcontract. As such, the annual receipts or employees of the other concern are included in determining the size of the selected 8(a) concern. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code industry designated for the contract. See paragraph (h) of this section for joint ventures controlled by tribally-owned concerns.

(c) *Contents of joint venture agreements.* The following provisions shall be included in all joint venture agreements:

(1) A provision setting forth the purpose of the joint venture.

(2) A provision designating the parties to the joint venture as co-managers.

(3) A provision stating that not less than 51 percent of the net profits

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earned by the joint venture shall be distributed to the 8(a) concern.

(4) A provision providing for the establishment and administration of a special bank account in the name of the joint venture. This account shall require the signature of all participants to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an 8(a) subcontract shall be deposited in the special account from which all expenses incurred under the subcontract shall be paid.

(5) An itemized description of all major equipment, facilities, and other resources to be furnished by each participant to the joint venture, with a detailed schedule of cost or value of each.

(6) A provision specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract and any subcontracts to the joint venture.

(d) *Other requirements.* Joint venture agreements are subject to the following additional requirements:

(1) The joint venture agreement must be approved in advance of contract award by the AA/MSB&COD or his/her designee.

(2) An employee of the 8(a) concern must be the designated project manager responsible for contract performance.

(3) Accounting and other administrative records relating to the joint venture shall be kept in the office of the 8(a) concern, unless approval to keep them elsewhere is granted by the Regional Administrator or his/her designee upon written request. Upon completion of the contract performed by the joint venture, the final original records shall be retained by the 8(a) concern.

(4) Quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) shall be submitted to SBA not later than 45 days after each operating quarter of the joint venture.

(5) A project-end profit and loss statement shall be submitted no later than 90 days after completion of the

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Small Business Administration

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financial statements tive contract receipts s (including salaries of e's principals) shall be BA not later than 45 operating quarter of .

-end profit and loss be submitted no later ter completion of the

contract including a statement of final profit distribution.

(e) *Obligation of performance.* All parties to the joint venture must sign such documents as are necessary to obligate themselves to ensure performance of the 8(a) contract.

(f) *Performance of work by 8(a) concern(s).* The 8(a) partner(s) to an eligible joint venture, and not the aggregate of all parties to the joint venture, must perform the applicable percentages of work required by § 124.314.

(g) *Inspection of records.* The SBA shall have the right to inspect the records of the joint venture without notice at any time deemed necessary.

(h) *Joint ventures with concerns owned by Indian tribes—(1) Exemption from size limitations.* The size limitations set forth in paragraph (b) of this section will not be applied to joint ventures entered into by an 8(a) concern owned and controlled by an economically disadvantaged Indian tribe, as defined in § 124.100, if the concern:

- (i) Owns and controls 51 percent or more of the joint venture;
- (ii) Is located on the reservation of or land owned by the tribe;
- (iii) Performs most of its activities on such reservation or tribally owned land; and
- (iv) Employs members of such tribe for at least 50 percent of its total workforce.

(2) *Limitations.* A tribally owned 8(a) concern as a party to a joint venture may receive the exemption set forth in paragraph (h) of this section on no more than two contracts.

(3) *Sunset.* This paragraph shall cease to be effective after September 30, 1991.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 55 FR 34903, Aug. 27, 1990]

§ 124.401 Advance payments.

(a) *General.* (1) Advance payments are disbursements of cash made by SBA to an 8(a) concern prior to the completion of performance of a specific 8(a) subcontract and are based on anticipated performance on the part of the 8(a) concern under a particular 8(a) subcontract. Advance payments are made for the purpose of assisting

the 8(a) concern to meet financial requirements pertinent to the performance of an 8(a) subcontract. Advance payments will be considered only after all other forms of financing have been considered by SBA and are determined to be either unavailable or unacceptable to support performance of the 8(a) subcontract.

(2) Advance payments may be authorized only for concerns which are current Program Participants at the time of the approval of the advance payment. A firm which has graduated from or otherwise exited the 8(a) program prior to approval is ineligible for advance payments. Where the concern will graduate from the 8(a) program during the initial performance period (base year), advance payments may be authorized only for that year, and may not be authorized for option years.

(3) Advance payments will be authorized only in connection with sole source 8(a) awards and not in connection with competitive 8(a) awards.

(4) The gross amount of advance payments will be determined by SBA at the time the request for such payments is approved. The gross amount of advance payments must be determined by SBA prior to commencement of performance of the contract, where possible. In no event shall the total amount of advance payments disbursed and not repaid exceed 90 percent of the outstanding unpaid proceeds of the 8(a) subcontract to which the advance payments relate. The value of unexercised options is not considered in determining the outstanding unpaid proceeds of the 8(a) subcontract. In the case of requirements and indefinite quantity type contracts, advance payments will be authorized only when a guaranteed minimum value is established in the 8(a) subcontract, and the amount of advance payments approved shall not exceed 90 percent of that guaranteed minimum. SBA must approve in writing any subsequent change in the gross amount of advance payments.

(5) All advance payments, whether disbursed by letter of credit or otherwise, and all 8(a) subcontract proceeds shall be deposited into a Special Bank Account established exclusively for

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THOMAS M. BARBA
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April 6, 1993

Mrs. Alyce Sullivan
Defense Acquisition Regulations Council
Cafritz Building
1211 South Fern Street
Room Number C-102
Washington, DC 22202

Re: DAR Case 91-54

Dear Mrs. Sullivan:

These supplemental comments are submitted on behalf of four small business refiners^{1/} in response to DoD's notice and request for comments on DAR Case 91-54 "Defense Federal Acquisition Regulation Supplement: Joint Ventures" ("proposed Rule" or "Rule") 57 Fed. Reg. 56895 (Dec. 1, 1992). Three of the four small business refiners are members of the American Independent Refiners Association. After submission of initial comments, our clients obtained and reviewed the comments filed in opposition to the proposed regulation by the Defense Fuel Supply Center and Barrett Refining Company.

Although we understand that the DAR Council does not ordinarily entertain replies to comments, we submit the following supplemental comments on behalf of the above listed companies in order to take issue with several misleading comments and erroneous statements of fact and law by the DFSC and Barrett. Our clients hope that the DAR Council will be able to consider this information in evaluating the proposed rule.

^{1/} The refiners are Berry Petroleum of Kilgore, Texas, Calcasieu Refining Company of Lake Charles, Louisiana, Huntway Refining Company of Wilmington, California, and Laketon Refining Company of Laketon, Indiana.

Mrs. Alyce Sullivan
April 6, 1993
Page 2

The comments of both the Defense Fuel Supply Center ("DFSC") and Barrett Refining Company ("Barrett") incorrectly suggest that Congress intended that small disadvantaged business ("SDB") participation in the price preference portion of DoD's bulk fuels program be limited to manufacturers and exclude SDB regular dealers. See Letter dated January 28, 1993 from Capt. L.H. Carpenter to the DAR Council ("DFSC comments") at 2. Congress has indicated no such intent. Indeed, Congress has instructed the Secretary of Defense to ensure just the opposite - broad based participation of all SDBs in the Department's Section 1207 program.

Barrett's comments unabashedly state that DoD's Section 1207 program is designed to assist "small disadvantaged businesses, particularly manufacturers, by creating access to the lucrative defense marketplace." The DFSC comments likewise state that DSFC views its mission as one "to provide premiums to SDB manufacturers who are natural participants in the bulk fuels market" and that permitting other SDB participation in the bulk fuels area, "would actually have a negative impact on the true purpose of the SDB program."

Regrettably, the DFSC misunderstands the clear directions of Congress, which require the Section 1207 program be one of inclusion of all kinds of SDBs; not one that excludes SDBs that the DFSC does not view as "natural participants." Section 1207 P.L. 99-661 instructs the Secretary of Defense to "maximize the number of minority concerns . . . participating in the program." 10 U.S.C. § 2301 (note (e)(4)). Nothing in the law even suggests that SDB manufacturers should be preferred over SDB regular dealers in obtaining price preference awards.

The proposed regulation would assist DoD in meeting the goal set by Congress by allowing a greater number of SDB concerns to participate in the DoD program, and would spur greater competition by expanding the number of companies competing for the government's business. The DFSC's view that it is somehow empowered to select those it views as "natural participants" for bulk fuels price premiums is at odds with the instructions of Congress and should not be perpetuated in the proposed regulation.

Barrett states that the Joint Conference Report accompanying the Defense Authorization Act of FY 1993, "directed DoD to publish a proposed regulation concerning DoD's version of the non-manufacturing rule which DoD had developed (DAR Case No. 91-055)." Barrett Comments at 3. However, this misstates the conference report. The report actually states:

Mrs. Alyce Sullivan
April 6, 1993
Page 3

the conferees direct the Secretary of Defense to issue a proposed regulation for comment on the non-manufacturer rule.

The conferees' clear intent is to preclude the continued use of "temporary deviations" which have served to completely block SDB dealer participation in the bulk fuels contracting program and which have been implemented without notice or opportunity for public comment.

Barrett's comments mislead in that they suggest SDB refiners are at an historical financial disadvantage when compared to small business refiners:

Disadvantaged manufacturers like Barrett entered the petroleum refining industry without the benefit of huge profits generated during the allocations period (which permitted then-existing refineries to purchase their facilities and finance their own crude oil acquisitions). For such disadvantaged petroleum refiners like Barrett, the cost of operations, including debt servicing and crude oil purchasing, is staggering. Much of the SDB price preference paid to such SDB manufacturers is used just to compensate for this severe financial disadvantage.

Barrett Comments at 5.

This wording seems to imply that Barrett has a financial disadvantage relative to regular small business competitors because the latter had accumulated a large amount of wealth during the allocations period and is now using that wealth to advantage in competing with Barrett. This implication is completely false. None of the small business competitors for Government contracts in the geographical areas supplied by Barrett were owners of the "then-existing refineries" during the period of time referred to in Barrett's comments.^{2/} Only one of 60 small business refineries in operation at that time still has

^{2/} Attachment A, excerpted from the March 30, 1991 Oil and Gas Journal, lists the 60 small business refineries in the states of Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas just before the allocations or entitlement period ended.

Mrs. Alyce Sullivan
April 6, 1993
Page 4

the same ownership it did then, and that refiner does not supply bulk fuels to the Government.

Barrett complains that under the Proposed Rule, "with little or no investment, a SDB regular dealer could form a joint venture with a non-SDB refiner.^{3/} The joint venture would then be permitted to supply the product of the non-SDB refiner and still take advantage of the DoD SDB price premium." However, Barrett fails to point out the similarity between this joint venture relationship and the relationships between SDB manufacturers and those financing their operations.

Under the DFSC bulk fuels program, a minority individual with essentially no refining experience and "little or no investment" can be financially sponsored by one or more entities which furnish the facilities needed for refining, the working capital needed for operations, and assist in other areas such as arranging raw material supplies. Under this kind of SDB financing arrangement, the lion's share of the subsidies paid by U.S. taxpayers does not accrue to the benefit of the SDB.^{4/}

Barrett also complains that if the Proposed Rule is adopted "[W]hat will be left, at best, will be nothing more than SDB regular dealers acting as fronts for non-disadvantaged small and large refiners."^{5/} However, the Proposed Rule precludes SDB dealers from purchasing supplies from large refiners. Also, under the proposed program SDB dealers would not be acting as fronts for non-disadvantaged small refiners any more than, if as much as, SDB manufacturers are acting as fronts for the large companies financially sponsoring their operations. It should be easier for the SBA and DOD to assure that an adequate share of the Government subsidies actually accrue to the SDB if both the SDB dealer/small business refiner relationships and the SDB manufacturer/financing entity relationships are required to be structured in some sort of joint venture relationship which requires disclosure of the share of Government subsidy payments the minority will be allowed to retain.

^{3/} Barrett comments at 6.

^{4/} Barrett's comments do candidly disclose that "much of the SDB price preference paid to such SDB manufacturers is used just to compensate for this severe financial disadvantage."

^{5/} Barrett Comments at 6.

Mrs. Alyce Sullivan
April 6, 1993
Page 5

DFSC asserts at page 1 of its comments that "the primary damage [under the Proposed Rule] would be to existing SDB manufacturers." However, DFSC fails to disclose that there are only three SDB manufacturers who were in business and received SDB bulk fuels contracts before 1992 who are still in business. One of those three, an Alaskan company, has been awarded only a deminimus amount of price premium dollars and has not filed comments opposing the Proposed Rule. The other two companies' operations have been financed by a subsidiary of the same large foreign trading company. Together these two companies had already received awards containing Government price subsidies of over \$26 million through October 1992 and each has already received additional awards with subsidies in 1993. Each is still certifying to the DFSC that it is economically disadvantaged and the DFSC continues to accept the statement that these companies who already obtained many millions of dollars in annual price premiums are "economically disadvantaged."

DFSC is also somehow under the incredible misunderstanding that the law requires all SDBs to have a "\$250,000 maximum net worth." See DFSC Comments at 1. If there were a \$250,000 maximum net worth limitation for SDBs, Barrett Refining Company, which has already been awarded contracts containing over \$18 million in price premiums (Government subsidies), certainly would not qualify as a SDB.^{6/} Regrettably, at the present time, the law provides no clearly defined limitation as to the net worth level of the owner of a SDB entity who is merely required to certify that he considers himself economically disadvantaged.

Sections (c) through (h) of DFSC's comments deal with imagined difficulties associated with administration of a joint venture program. Many of these suggestions appear valid provided the same requirements are placed on all SDBs whether dealer or manufacturer. SDB manufacturers are currently subject to no such limitation and their operations do not comply with the proposed items.

Each SDB program should require that the SDB have arrangements which will result in the SDB getting and being able to retain an appropriate share of the Government subsidy payments

^{6/} Furthermore, Dun & Bradstreet information indicates the principal owner of that corporation is also the owner of Barrett Drilling Company, which is shown to have a net worth of several million dollars.

Mrs. Alyce Sullivan
April 6, 1993
Page 6

and preclude Government subsidies wherein most of the benefits go to an entity controlling the financing of the operations.

Finally, the proposed regulation could serve to permit increased competition among refiners; the most efficient refiners would survive without continued Government assistance. Those operations that cannot survive in a competitive environment should not be provided Government assistance in perpetuity.

We hope that the DAR Council will be able to consider this information in making its decision relative to the regulation under consideration.

Sincerely,

Thomas M. Barba

Thomas M. Barba

cc: Hon. Sam Nunn, Chairman, Senate Armed Services Committee
Hon. Ron Dellums, Chairman, House Armed Services Committee

ATTACHMENT A

SMALL BUSINESS REFINERIES EARLY 1981

(FROM OIL & GAS JOURNAL -- MARCH 30, 1981)

Florida:	Manatee Energy (Palmetto) Seminole (St. Marks)	TEXAS:	Adobe (La Blanche) Carbonit (Hearne) Clinton Manges (Tucker) Copano (Ingleside) Dorchester (Mt. Pleasant) Eddy (Houston) Erickson (Port Neches) Flint (San Antonio) Friendswood (Houston) Gulf States (Corpus Christi) Howell (San Antonio) Liquid Energy (Bridgeport) Longview (Longview) Pioneer (Nixon) Pride (Abilene) Saber (Corpus Christi) Sentry (Corpus Christi) Signmore (Three Rivers) South Hampton (Silsbee) Texas Armada (Ft. Worth) Thriftway (Graham) Tipperary (Ingleside) Uni (Ingleside) Verdette (Brownsville) Winston (Ft. Worth)
Alabama:	Marion (Theodore) Mobile Bay (Chickasaw) Vulcan (Cordova) Warrior (Holt)		
Mississippi:	Ergon (Vicksburg)* Natchez (Natchez) Vicksburg (Vicksburg)		
Louisiana:	Bayou State (Hosston) Bruin (St. James) Calumet (Princeton) Canal (Church Point) Claiborne (Lisbon) CPI (Lake Charles) Evangeline (Jennings) Hill (Krotz Springs) La Jet (St. James) Lake Charles (Lake Charles) Mallard (Gueydon) Mt. Airy (Mt. Airy) Port Petroleum (Stonewall) Shepherd (Mermentau) Sooner (Egan) Slapco (Mermentau) T&S (Jennings)	OKLAHOMA:	Allied Material (Stroud) Hudson (Cushing) OKC (Okmulgee) Oklahoma Refining (Cyril & Thomas) Tonkawa (Arnett)
ARKANSAS:	Berry (Stevens) Cross (Smackover)		

* ONLY REFINERY WITH SAME OWNERSHIP

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91-54-10

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THOMAS M. BARBA
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January 29, 1993

Mrs. Alyce Sullivan
Cafritz Building
1211 South Fern Street
Room # C-102
Washington, D.C. 22202

Re: DAR Case 91-54

Dear Mrs. Sullivan:

Enclosed please find the comments of Berry Petroleum, Calcasieu Refining Co., Huntway Refining Co., and Laketon Refining Co. on "Defense Federal Acquisition Regulation Supplement: Joint Ventures," 57 Fed. Reg. 56895 (Dec. 1, 1992).

If you have any questions regarding the enclosed comments, please do not hesitate to call me.

Sincerely,

Thomas M. Barba
G.S.C.
Thomas M. Barba

Enclosure

62

**Comments of Berry Petroleum, Calcasieu Refining Co.,
Huntway Refining Co. and Laketon Refining Co. on
"Defense Federal Acquisition Regulation Supplement:
Joint Ventures"**

57 Fed. Reg. 56895

Counsel:

**Martin D. Schneiderman
Thomas M. Barba
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036**

January 29, 1993

DAR Case 91-54

EXECUTIVE SUMMARY

These comments are submitted on behalf of four small business refiners^{1/} in response to DoD's notice and request for comments on "Defense Federal Acquisition Regulation Supplement: Joint Ventures" ("proposed Rule" or "Rule"), published in the Federal Register on December 1, 1992. See 57 fed. Reg. 56895. Three of the four small business refiners are members of the American Independent Refiners Association.

Each of the identified companies support what they understand to be the clear intent of the proposed Rule. The Rule broadens the participation in SDB programs by permitting joint ventures between SDB concerns and non-SDB concerns which meet certain criteria. The proposed Rule provides a way for all SDB concerns to benefit from SDB programs, as well as to allow small businesses to participate in a limited manner in those same programs. This is consistent with congressional intent to ensure full and fair opportunity to all SDBs with regard to government business. The proposed Rule also satisfies repeated requests of the Congressional leadership in various conference committee reports and letters for improved DoD compliance with the goals of the Section 1207 program, including broader SDB and small business participation. Furthermore, the proposed Rule will promote harmony between SDBs, 8(a) concerns, and small businesses, each of which compete for set-aside awards.

^{1/} The refiners are Berry Petroleum of Kilgore, Texas, Calcasieu Refining Company of Lake Charles, Huntway Refining Company of Wilmington, California, and Laketon Refining Company of Laketon, Indiana.

I. THE PROPOSED RULE IS CONSISTENT WITH
CONGRESSIONAL INTENT TO ENSURE BROAD
PARTICIPATION BY SDBs IN GOVERNMENT BUSINESS

When Congress created the Small Disadvantaged Business Program in November of 1986 it directed that the program be as inclusive as possible for all types of SDBs. Section 1207 of the National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973, instituted a set-aside program for small disadvantaged business ("SDBs") and established a goal of awarding five percent of all DoD contract dollars to SDB contractors. See 100 Stat. at 3973; 10 U.S.C. § 2301 (note (a)) (Supp. 1992).

To meet the minority contracting goal, Congress instructed the Secretary of Defense to use "his utmost authority, resourcefulness, and diligence". 100 Stat. at 3973 (note (e)). In addition, Congress specifically authorized the Secretary of Defense to "deviate from normal competitive contracting procedures . . . when necessary to facilitate the achievement of the 5 percent goal. . . ." Id. at 3974. See Commercial Energies, Inc. v. United States, 20 Cl. Ct. 140, 146 (1990) ("Congress wanted the Secretary of Defense to use all resources, even less than competitive measures, to secure increased minority and SBD participation."). Of greater significance, Congress instructed DoD to "maximize the number of minority concerns . . . participating in the program."). 10 U.S.C. § 2301 (note(e)(4)). Congress has never placed any limits on the type of SDBs allowed to participate in the program -- SDB manufacturers and SDB dealers are treated the same under the law. Despite these

requirements, DoD itself has limited SDB dealer participation in various implementing regulations.

II. THE PROPOSED RULE'S APPARENT INTENT IS TO TREAT SDB JOINT VENTURES AND SDB MANUFACTURERS EQUALLY

The proposed Rule, much like the SDB statute, does not limit access to SDB program benefits based on the type of the SDB involved, and is written in a manner which increases SDB opportunities for companies participating in those programs. Based on its most straightforward interpretation, the Rule's apparent intent is to override any restrictions which differentiate one type of SDB from another when certain joint ventures are involved and at least one of the concerns is an SDB. This conclusion is supported by the Rule's terminology and a conference report which directed DoD to issue a regulation to broaden participation in SDB programs. See House/Senate Conference Report No. 102966, Title VIII, at p. 723 (Oct. 1, 1992) [Attachment A].

Given Congress' intent to maximize participation in SDB programs, it is logical that the proposed Rule purports to treat small business manufacturers (which become SDBs when acting as an approved joint venture under the Rule) in the same manner as an SDB manufacturer. In such cases, the proposed Rule levels the playing field by eliminating the DFARS restrictions on SDB regular dealer participation^{2/} when the joint venture criteria are satisfied. If this were not the intent of the new proposed Rule there would be little if any reason for its promulgation because the only significant change from previous regulations would be one of permitting an SDB concern -- rather than a

^{2/} See 48 C.F.R. §§ 252.219-7001, 252.219-7002.

disadvantaged individual -- to hold the majority ownership in another concern and still meet the requirements for being a SDB regular dealer.

This straightforward interpretation of the Rule provides a mechanism for achieving the objectives contained in the May 1992 House Armed Services Committee proposal for the FY93 Defense Appropriation Bill. That proposal would have permitted greater SDB dealer participation in one of DoD's major procurement programs, the bulk fuels program. See H.R. 5006, 102 Cong., 2d Sess. § 802 (May 19, 1992) [Attachment B]. Specifically, the language in the House committee proposal would have permitted a SDB regular dealer to receive preference awards when supplying products manufactured by a small business manufacturer. The proposed House Committee wording was not included in the national defense Authorization Act for fiscal Year 1993, but the objectives of the wording were strongly supported by the House/Senate conference report which "direct[ed] the Secretary to conduct a prompt review of DOD and prime contractor efforts to increase subcontract awards to small businesses and small disadvantaged businesses and to propose additional strategies to increase such awards.") (emphasis added).

Presumably, the proposed Rule is DoD's response to the aforementioned congressional directive. The proposed Rule's impact, specifically its ability to help DoD achieve Congress' goal of awarding five percent of all DoD contract dollars^{3/},

^{3/} See id. ("The conferees are concerned that subcontract awards by DOD prime contractors to small business concerns (including small disadvantaged businesses) declined 5.3 percent in fiscal year 1991 compared to the preceding year.").

will be significantly reduced unless the Rule is interpreted to allow all properly constituted joint ventures (those with SDB regular dealers and small business manufacturers) to bid on SDB programs on the same terms as SDB manufacturers. The Rule's expansion of the SDB base by including joint ventures with small businesses is also consistent with congressional intent. See supra House/Senate Conference Report at p. 723 (DoD directed to review efforts to increase awards to SDBs and to other small businesses).^{4/}

III. WORDING CHANGES PROPOSED

The proposed Rule as written does not fully clarify that a joint venture entity is considered to be the equivalent of a SDB manufacturer insofar as preference awards are concerned. This intent should be clarified by changing the last word in paragraph 219.001 from "concerns" to "manufacturers". Without that word change it is possible that some entities could misinterpret the intent of the regulation, and presume that a joint venture SDB concern is actually a SDB regular dealer concern by virtue of the controlling partner being a SDB dealer; consequently, under the existing provisions of 252.219-7001 and the proposed provisions of 252.219-7002(c)(1), the joint venture would have to furnish product manufactured by a SDB manufacturer. In our view, this would be a serious misinterpretation of the

^{4/} See also Letter from Les Aspin, Chairman of the Committee on Armed Services to Honorable Dick Cheney, Secretary of DoD (April 10, 1992) (In referring to the 10% price differential as perhaps too high and the fact that non-minorities which control SDBs may be benefiting from the price preferences, the Chairman stated: "Our intent is to ensure that both small and small disadvantaged businesses are afforded equal opportunities to compete.") (emphasis added) [Attachment C].

intent of the regulation. Accordingly, it would be prudent for DoD to clarify the language of paragraph 219.001 to avoid any such misinterpretation.

Along the same lines, the wording in the proposed Rule would also be improved by changing the language in 252.219-7002(c)(2) to the following: "A small disadvantaged business joint venture offeror which submits an offer agrees to furnish in performing this contract only end items manufactured or produced by a small business manufacturer in the United States, its territories and possessions, the Commonwealth of Puerto Rico, the U.S. Trust Territory of the Pacific Islands, or the District of Columbia. Furthermore, the offeror, upon request by the Contracting Officer, agrees to submit a signed SDB joint venture agreement, as described in paragraph (a)(2) of this clause." A similar change ought to be made to the language in 252.219-7001(f)(3).

IV. OTHER REGULATION CHANGES NEEDED

13 C.F.R. § 124.109(e) states: "A concern which is owned in whole or in part by another business concern and relies on the disadvantaged status of that concern to claim disadvantaged status is ineligible for 8(a) Program Participation and for participation in the Defense Department's Small Disadvantaged Business program. . . ." This SBA regulation might be interpreted to defeat the intent of the proposed Rule, and prevent the type of joint ventures contemplated by the proposed Rule. This concern could be solved by adding the following preface to 13 C.F.R. § 124.109(e): "Except for the case of a small disadvantaged business joint venture. . . ."

Thank you for considering these comments and please
feel free to contact the undersigned if there are any questions.

Respectfully submitted,

Thomas M. Barba
Martin D. Schneiderman 65
Thomas M. Barba
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
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Tab A

102d CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

Report
H.R. 966

NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 1993

CONFERENCE REPORT

2900

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Defense health care system
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sionals are qualified to perform utilization review and managed
care activities, and are licensed and competent in the area of care
needed by the consumer.

Such standards should include a requirement that neither the
providers nor any reviewing professional or agent have any finan
cial incentive in the outcome of the prescribed treatment methodol
ogy followed.

Partial hospitalization under CHAMPUS

The conferees believe it is critical that a wide range of mental
health options be available to CHAMPUS beneficiaries, so that
services can be received in the most appropriate and cost-effective
setting.

The conferees believe that partial hospitalization is an imp
ortant benefit to bridge the transition from inpatient to outpatient
care in order to ensure that there is no disruption in the continuity
of care for beneficiaries. The conferees intend to continue to closely
monitor the Department of Defense implementation of this pro
gram, including the determination of reasonable reimbursement
rates.

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

LEGISLATIVE PROVISIONS

LEGISLATIVE PROVISIONS ADOPTED

Codification and amendments to section 1207 (sec. 801)

The House bill contained a provision (sec. 801) that would
extend the five percent goal program for the award of DOD con
tracts and subcontracts to small disadvantaged businesses, histori
cally Black colleges and universities, and minority institutions
through fiscal year 2000 (section 1207 of the National Defense Au
thorization Act for Fiscal Year 1987 (Public Law 99-661)). In addi
tion, this provision of law would be codified as section 2323 of title
10, United States Code.

The Senate amendment contained a provision (sec. 814) that
would extend the program through fiscal year 2000 and require the
establishment of a process to review claims that the use of SDB set
-asides has caused an industry category to bear a disproportionate
share of the progress toward the goal.

The Senate recedes with a technical amendment.

The conferees agree to consolidate all section 1207-related pro
visions into a single section. The additional codified provisions are:
(1) section 806 of the National Defense Authorization Act for Fiscal
Years 1988 and 1989 (Public Law 100-180); and (2) section 832 of
the National Defense Authorization Act for Fiscal Years 1990 and
1991 (Public Law 101-189).

Provisions relating to small businesses and small disadvantaged businesses (sec. 802)

The House bill contained a provision (sec. 802) that would: (1)
apply the "non-manufacturer rule" to the program established by

section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661); and (2) require the Secretary of Defense to issue regulations to ensure prime contractors comply with existing subcontracting requirements and make subcontracting plans a factor in the contract award process.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment.

The Defense Department has advised the conferees that it has developed a proposed regulation concerning the non-manufacturer rule. However, DOD has delayed issuance of this rule at the request of the Small Business Administration, which also intends to publish a rule on this subject. The conferees direct the Secretary of Defense to immediately issue a proposed regulation for comment on the non-manufacturer rule.

The conferees are concerned that subcontract awards by DOD prime contractors to small business concerns (including small disadvantaged businesses) declined 5.3 percent in fiscal year 1991 compared to the preceding year. The regulations required by this provision are intended to ensure that this decline does not become a trend and that the Department and its prime contractors enforce and comply with existing subcontracting plan requirements.

The conferees direct the Secretary to conduct a prompt review of DOD and prime contractor efforts to increase subcontract awards to small businesses and small disadvantaged businesses and to propose additional strategies to increase such awards. The results of this review should be reported to the Committees on Armed Services of the Senate and House of Representatives by April 1, 1993.

Under current law (section 806 of the National Defense Authorization Act of Fiscal Years 1988 and 1989 (Public Law 100-180)), the Secretary is required to make the administration of small business subcontracting plans a factor in the evaluation of the performance of contracting officials. The conferees direct the Secretary to take the appropriate steps to ensure that this requirement is fully enforced.

Funding for defense research by historically Black colleges and universities and minority institutions (HBCU/MI) (sec. 803)

The Senate amendment contained a provision (sec. 814) that would authorize \$15.0 million for the HBCU/MI infrastructure assistance program established in section 832 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510).

The House bill contained no similar provision.
The House recedes.

Small Business Administration certificate of competency program (sec. 804)

The Senate amendment contained a provision (sec. 811) that would modify the Small Business Administration (SBA) certificate of competency program as it affects the defense acquisition process.

The House bill contained no similar provision.

The House recedes with an amendment that would require: (1) DOD contract solicitations to advise small businesses of their right to request the Small Business Administration to review a contract-

ing officer's determination to perform a contract business in writing the right to request the end of fiscal year.

Extension of program for small business subcontracting

Section 834
Fiscal Years 1990
approved prime con-
division- or compa-
fiscal year 1993.

The Senate bill
would extend this
The House bill
The House re-

Extension of test program (sec. 806)

Section 843
Fiscal Year 1989
authorizing the Pu-
vantaged busines-
sence Departmen-
goal for awards t-
Authorization A-
program expires

The Senate bill
would extend this
The House bill
The House re-

Pilot mentor-pro

The Senate bill
would authorize
established under
tion Act for Fis-
Senate provision
publish and ma-
gram in the de-
provision also w-
gé program as i-
of affiliation or
ministration's s-
protégé agree-
The House bill
The House re-

Codification of certain non-

The Senate bill
would codify se-
tions Act for Fi-

tab B

Union Calendar No. 311

102D CONGRESS
2D SESSION

H. R. 5006

[Report No. 102-527]

To authorize appropriations for fiscal year 1993 for military functions of the Department of Defense, to prescribe military personnel levels for fiscal year 1993, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 29, 1992

Mr. ASPIN (for himself and Mr. DICKINSON) (both by request) introduced the following bill; which was referred to the Committee on Armed Services

MAY 19, 1992

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on April 29, 1992]

A BILL

To authorize appropriations for fiscal year 1993 for military functions of the Department of Defense, to prescribe military personnel levels for fiscal year 1993, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

1 in lieu thereof "and may not be paid a bonus under this
 2 section unless the skill associated with the position the mem-
 3 ber is projected to occupy is a skill in which the member
 4 successfully served while on active duty and attained a level
 5 of qualification commensurate with the member's grade and
 6 years of service.".

7 **TITLE VIII—ACQUISITION POLICY, ACQUI-
 SITION MANAGEMENT, AND RELATED
 MATTERS**

10 ***Subtitle A—Acquisition Assistance Programs***

11 ***SEC. 801. CODIFICATION OF SECTION 1207.***

12 (a) *CODIFICATION.—(1) Chapter 137 of title 10,*
 13 *United States Code, is amended by inserting after section*
 14 *2322 a new section 2323 consisting of—*

15 (A) *a heading as follows:*

16 *“§ 2323. Contract goal for minorities”;*

17 *and*

18 (B) *a text consisting of the text of section 1207*
 19 *of the National Defense Authorization Act for Fiscal*
 20 *Year 1987 (Public Law 99–661), revised—*

21 (i) *by replacing “each of fiscal years 1987,*
 22 *1988, 1989, 1990, 1991, 1992, and 1993” in sub-*
 23 *section (a)(1) with “each of fiscal years 1987*
 24 *through 2000”;*

1 (ii) by replacing "each of fiscal years 1987,
2 1988, 1989, 1990, 1991, 1992, and 1993." in
3 subsection (h) with "each of fiscal years 1987
4 through 2000."; and

5 (iii) by replacing "of title 10, United States
6 Code," in subsection (e)(2) with "of this title".

7 (2) The table of sections at the beginning of such chap-
8 ter is amended by inserting after the item relating to section
9 2322 the following new item:

10 "2323. Contract goal for minorities."

11 (b) CONFORMING REPEAL.—Section 1207 of the Na-
12 tional Defense Authorization Act for Fiscal Year 1987 (Pub-
13 lic Law 99-661; 100 Stat. 3973) is repealed.

14 SEC. 802. PROVISIONS RELATING TO SMALL DIS-
15 ADVANTAGED BUSINESSES AND SMALL BUSI-
16 NESSES.

17 (a) NONMANUFACTURING RULE AND SUBCONTRACTING
18 PLAN REQUIREMENTS.—Section 2323 of title 10, United
19 States Code, as inserted by section 801, is amended—

20 (1) by redesignating subsection (h) as subsection
21 (k); and

22 (2) by inserting after subsection (g) the following
23 new subsections:

24 "(h) RULE RELATING TO NONMANUFACTURERS.—(1)
25 An otherwise responsible business concern that is in compli-
 ance with the requirements of paragraph (2) shall not be

1 denied the opportunity to submit and have considered its
2 offer for a procurement contract for the supply of a product
3 to be awarded under the program provided for by this sec-
4 tion solely because such concern is other than the actual
5 manufacturer or processor of the product to be supplied
6 under the contract.

7 "(2) To be in compliance with the requirements re-
8 ferred to in paragraph (1), such a business concern shall—

9 "(A) be primarily engaged in the wholesale or
10 retail trade;

11 "(B) be a small business concern under the nu-
12 mercial size standard for the Standard Industrial
13 Classification Code assigned to the contract solicita-
14 tion on which the offer is being made;

15 "(C) be a regular dealer, as defined pursuant to
16 section 1(a) of the Act of June 30, 1936 (41 U.S.C.
17 35(a)) (popularly referred to as the Walsh-Healey
18 Act), in the product to be offered the Department of
19 Defense; and

20 "(D) represent that it will supply the product of
21 a domestic small business manufacturer or processor,
22 unless a waiver of such requirement is granted—

23 "(i) by the Secretary of Defense, after re-
24 viewing a determination by the contracting offi-
25 cer that no small business manufacturer or proc-

1 essor can reasonably be expected to offer a prod-
2 uct meeting the specifications (including period
3 for performance) required of an offeror by the so-
4 licitation; or

5 "(ii) by the Secretary of Defense for a prod-
6 uct (or class of products), after determining that
7 no small business manufacturer or processor is
8 available to participate in the Federal procure-
9 ment market.

10 "(i) **SUBCONTRACTING PLAN.**—The Secretary of De-
11 fense shall prescribe regulations to ensure that potential
12 contractors submitting sealed bids or competitive proposals
13 to the Department of Defense for procurement contracts to
14 be awarded under the program provided for by this section
15 are complying with applicable subcontracting plan require-
16 ments of section 8(d) of the Small Business Act (15 U.S.C.
17 637(d)).

18 "(j) **EVALUATION OF CONTRACTING OFFICERS.**—The
19 administration by a contracting officer of the regulations
20 prescribed under subsection (i) shall be a factor in the eval-
21 uation of the performance of the contracting officer.".

22 (b) **ADDITIONAL EVALUATION FACTOR FOR SOLICITA-**
23 **TIONS.**—Section 2305(a) of title 10, United States Code, is
24 amended by adding at the end the following new paragraph:

1 "(4) With respect to a sealed bid or competitive pro-
2 posal for which the bidder or offeror is required to negotiate
3 or submit a subcontracting plan under section 8(d) of the
4 Small Business Act (15 U.S.C. 637(d)), the subcontracting
5 plan shall be a significant factor in evaluating the bid or
6 proposal and shall be included in the statement required
7 pursuant to paragraph (2)(A).".

8 **SEC. 803. CLARIFICATION OF CALCULATION OF CONTRACT**

9 **GOAL.**

10 Section 2323 of title 10, United States Code, as in-
11 serted by section 801 and amended by section 802, is further
12 amended—

13 (1) by redesignating subsection (k) as subsection
14 (l); and

15 (2) by inserting after subsection (j) the following
16 new subsection:

17 "(k) **CALCULATION OF CONTRACT GOAL.**—For pur-
18 poses of calculating the goal of subsection (a), the total com-
19 bined amount obligated for contracts and subcontracts en-
20 tered into with the entities described in subparagraphs (A)
21 through (C) of subsection(a)(1) shall be construed as being
22 the aggregate of the amounts of—

23 "(1) all prime contracts entered into by the De-
24 partment of Defense with such entities; and

tab C

SMALL BUSINESS ADVISORY COUNCIL
S. B. DIAZ, CHAIRMAN
MAGGIE MONTIBA
CAROLYN O'NEILL
ALICE J. BROWN, VICE-CHAIR
TOM HANSEN, SECRETARY
JOHN E. KELLY, CHAIR-ECONOMIC POLICY
JEREMY A. COOPER, CHAIR-APPRAISAL
JOSEPH J. LIEBERMAN, CONSULTANT
PAUL RABINOWITZ, MINNESOTA
RICHARD THOMPSON, TEXAS

MEMBERSHIP
DANIEL B. STANLEY, DIRECTOR
CGRB - CONGRESSIONAL MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510-6260

April 9, 1992

The Honorable Donald J. Yockey
Under Secretary of Defense (Acquisition)
The Pentagon, Room 3E-933
Washington, D.C. 20301

Dear Mr. Yockey:

We are writing to request your assistance in prioritizing the issuance of a change to the Defense Federal Acquisition Regulation Supplement (DFARS) which would broaden the participation in the Department's Section 1207 Program. Since this regulatory change will foster economic growth its issuance should not be impeded by the President's regulatory moratorium.

Specifically, we are asking that you direct that action be promptly taken regarding a DFARS modification proposed in DAR Case 91-055, which would permit certain small business concerns owned and controlled by socially and economically disadvantaged individuals, referred to by the Department as small disadvantaged businesses (SDBs), to offer the product of any small business concern, if the SDB meets the standards for a "regular dealer". Currently a DFARS deviation, which expires soon, requires certain prospective SDB contractors to offer products produced by another SDB. For many DOD requirements, the number of SDB manufacturers is very limited or non-existent. Further, it is likely that such an SDB manufacturer would sell directly to the Government rather than through a regular dealer. Current DFARS coverage requires an individual contracting officer to make a case-by-case determination regarding the availability of an SDB supplier. The regulatory change recommended in DAR Case 91-055 would permit the Department's contracting officers to rely on formal determinations made by the Small Business Administration (SBA).

The Congress has already expressed itself regarding this matter, often referred to as the "non-manufacturer rule". The "Small Business Administration Reauthorization and Amendments Act of 1990", Public Law 101-574, included at Section 210 (Nonmanufacturer Rule) explicit direction regarding the SBA's Minority Small Business and Capital Ownership Development (MSB/COD) Program, more commonly referred to as the SBA Section 8(a) Program. It was expected that a similar change would be implemented with respect to DOD's Section 1207 Program by regulation.

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- 2 -

Apparently, some within DOD's acquisition community want to extend the current DFARS deviation and avoid publishing the proposal regarding DOD implementation of the nonmanufacturer rule. We would urge that action on DAR Case 91-055 be completed and the proposal be published for public comment as soon as possible. Pending receipt and analysis of public comments on the proposal, action to extend the current DFARS deviation should be suspended.

Departmental representatives frequently express the position at hearings and in other forums that Congress should avoid enacting legislation that DOD views as "Congressional micromanagement of the acquisition process". Rather, such details should be left to the regulatory process. In our experience Congressional action generally comes after no other timely alternative appears available to affect the needed change to the procurement system which will benefit of the public.

Thank you for your attention to this request. I know you, too, want to improve the business development potential of DOD's Section 1207 Program for the maximum number of small business concerns owned and controlled by socially and economically disadvantaged individuals.

Sincerely,



Robert W. Kastan, Jr.
Ranking Minority Member

Dale Bumpers
Chairman



92-54-11

LAS ENERGY CORPORATION

Lakewood Office Park
1035 South Semoran Blvd.
Suite 1027 - Bldg. #2
Winter Park, Florida 32782

Fla. (407) 878-2800
Fax No. (407) 878-3099
NJ (201) 944-1300
Fax No. (201) 944-9703
Telex 845577

January 29, 1993

Fax No. (703) 697-9845

The Defence Acquisition Regulations Council
ATTN: IMD 3D 139, OUSD(A)
3062 Defense Pentagon,
Washington D.C. 20301-3062

RE: DAR Case 91-54
Federal Register Notice concerning "Joint Venture"
Agreements complying with SDB requirements.

To Whom it may concern:

Reference is made to our response dated December 29, 1992
(copy attached) conveying our support for the subject "Joint
Venture" agreements.

It has recently been brought to my attention that a
contradicting SBA rule exists in the form of 13 CFR
124.109(e) which in effect states in part, that business
concerns owned in whole or part by another is ineligible for
participation in the Small Disadvantaged Business Program.

Accordingly, our referenced response is being adjusted to
incorporate a request for this rule to be eliminated or
amended to recognize the legitimacy of "Joint Ventures"
proposed by DAR case 91-54.

Sincerely yours,

A handwritten signature in black ink.

Leo A. Sullivan
President

LAS/sg
100qb

**LAS ENERGY CORPORATION**

Lakeview Office Park
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Telex 645577

92-54-12

December 29, 1992

Fax No. (703) 697-9845

The Defence Acquisition Regulations Council
ATTN: IMD 3D 139, OUSD(A)
3062 Defense Pentagon,
Washington D.C. 20301-3062

RE: DAR Case 91-54
Federal Register Notice concerning "Joint Venture"
Agreements complying with SDB requirements.

To Whom it may concern:

LAS Energy Corporation is a former (having graduated in September 1992) S.B.A. 8(a) concern active in the oil industry. LAS Energy also satisfies the definition of a S.D.B. concern, and in fact has attained D.O.D. contracts under this latter status in 1989/90, until Defense Fuel Supply Center (DFSC) adopted provisions under the non-manufacturer rule, by way of a deviation to the regulation, to nullify true SDB participation.

LAS Energy fully supports the proposed rule changes contained in the Federal Register - 56895, December 1, 1992, but would also like to use this opportunity to appeal to the DAR Council and D.O.D. to repeal the existing D.O.D/D.F.S.C deviations that would inhibit the establishment of supply relationships with small businesses and/or joint ventures, in the format being proposed, for S.D.B's who may have aspirations to participate in the D.F.S.C - Bulk Fuels Program.

Many thanks for providing me the opportunity to submit comments on the proposed changes.

Sincerely

Leo A. Sullivan
President

LAS/BS
100q

92-5413

REID & PRIEST
MARKET SQUARE
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
202 508-4000

NEW YORK OFFICE
 40 WEST 57TH STREET
 NEW YORK, N.Y. 10019-4087
 212 603-2000
 FACSIMILE: 212 603-2898
 CABLE ADDRESS: "REIDAPT"
 TELEX: 7105816721 RDPT NYK
 220534 RDPT UR

WASHINGTON OFFICE
 FACSIMILE: 202 508-4381
 TELEX: 440689 RP WASH
 DIRECT DIAL NUMBER

January 29, 1993

BY TELECOPIER

Defense Acquisition Regulations Council
 ATTN: IMD 3D139, OUSD(A)
 3062 Defense Pentagon
 Washington, D.C. 20301-3062

Re: DAR Case 91-54: Proposed Amendment to
 Defense FAR Supplement Parts 219 and 252 -
 Joint Ventures

Dear Sirs:

On behalf of Pride Refining, Inc. ("Pride"), a small business refiner, we hereby submit these comments to the proposed rule concerning joint ventures involving small disadvantaged business concerns ("SDBs") and nondisadvantaged small concerns. Pride supports the proposal subject to clarification as set forth herein.

In enacting the SDB program, Congress directed the Defense Department to "maximize the number of minority small business concerns . . . participating in the program." Section 1207(e)(4) of the National Defense Authorization Act of 1987. Congress also directed the Defense Department to minimize the impact of the program on non-SDB small business concerns. Section 806(b)(7) of the National Defense Authorization Act of 1988. The proposed rule seeks to comply with these Congressional mandates by allowing SDBs to obtain contracts using the SDB price advantage in joint ventures but only if the participant in the joint venture is a small business.

We can conceive of possible joint ventures for non-SDB small refiners like ourselves which may occur under the proposed rule, including combinations with SDB refiners and SDB dealers. The proposed rule, however, is unclear as to how a joint venture involving an SDB dealer would be classified. The appropriate approach would be to consider

REID & PRIEST

- 2 -

such a joint venture as a manufacturer, so that SDB dealers, which are more numerous than SDB refiners, can have a full opportunity to participate in the SDB program. This would expand the number of SDB companies that can benefit from the program and also enable the DOD to meet or exceed its 5 percent SDB participation goal. We strongly recommend this clarification of the proposed rule.

Respectfully submitted,

Richard J. Leidl
Richard J. Leidl
Counsel for
Pride Refining, Inc.

Congress of the United States**Washington, D.C. 20515****January 29, 1993****HAND DELIVERED**

Mrs. Alyce Sullivan
The Defense Acquisition Regulations Council
Attn: IMD 3D139
OUSD(A)
3062 Defense Pentagon
Washington D.C. 20301-3062

Re: DAR Case 91-54

Dear Mrs. Sullivan:

The following are our comments regarding the proposed rule issued by your office on December 1, 1992 regarding small disadvantaged business (SDB) joint ventures to provide fuel under the Department of Defense (DoD) Section 1207 Bulk Fuel Program.

We support the efforts to encourage SDB participation in the bulk fuel program and we urge you to complete the rulemaking as soon as possible.

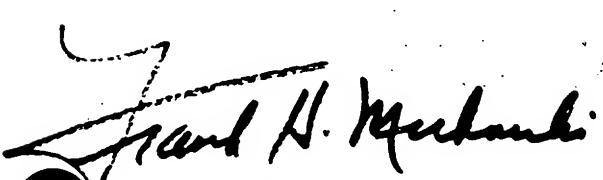
To meet DoD's goal to award 5% of its contract dollars to SDB concerns, DoD offers evaluation preferences to SDB concerns in competitive procurements. In general, where an SDB concern is a "regular dealer" (not a manufacturer) it may offer the product of a small business manufacturer and still receive the evaluation preference. This practice should be continued and applied uniformly to all procurements involving SDB concerns and SDB joint ventures.

However, the Defense Fuel Supply Center (DFSC) currently conducts its Bulk Fuel Supply Program under a Class Deviation to the DFARS (DAR case 92-919-01). Under this Deviation, DFSC denies the DoD evaluation preference to any SDB concern which offers petroleum products manufactured by a small -- as opposed to small and disadvantaged -- business concern. This deviation is not mentioned in the current rulemaking. It should be specifically referenced and terminated as part of the Final Rule. In addition, the Final Rule should state that a SDB joint venture may furnish end items manufactured and produced by the small business entity within the joint venture.

Mrs. Alyce Sullivan
January 29, 1993
PAGE 2

The new DFARS definition of SDB concerns, including joint ventures, includes all "Indian tribes." While we understand you intend to include Alaska Natives and Alaska Native Corporations under this category, in order to eliminate any confusion the current language "Indian tribes" should be modified to comply with the Small Business Administration regulations which read: "Indian tribes, including Alaska Native Corporations" (See 13 C.F.R. § 124.112).

With the changes noted above, we believe the Section 1207 Program will be implemented as intended. The full participation of SDB joint ventures as SDB concerns, including the evaluation preference, will ensure that real strides are made in assisting these firms and that, to the extent practicable, DoD maximizes the number of SDB concerns participating in the Program. We urge you to promulgate the Final Rule within 30 days.

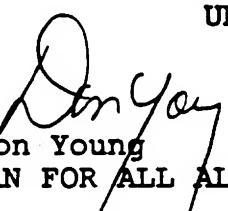


Frank H. Murkowski
UNITED STATES SENATOR

Sincerely,



Ted Stevens
UNITED STATES SENATOR



Don Young
CONGRESSMAN FOR ALL ALASKA

THE NAVAJO NATION

92-54-15

PETERSON ZAH
PRESIDENT

MARSHALL PLUMMER
VICE PRESIDENT

February 01, 1993

Defense Acquisition Regulations Council
ATTN: IMD3D139, OUSD(A)
3062 Defense Pentagon
Washington, D.C. 20301-3062

RE: DAR case 91-54 Comments of the Navajo Nation on "Defense Federal Acquisition Regulations Supplement: Joint Ventures" 57 Fed. Reg. 56895

The proposed amendments 48 C.F.R. Parts 219 and 252 have been brought to the attention of the Navajo Nation. The Navajo Nation is in the process of studying the possibility of participation in the Bulk Fuels Program either through acquisition of a refinery or through establishment of a dealership. Therefore, the Navajo Nation is particularly interested in this rule making. Since the rule making has just come to our attention and because of the short time period for responding, we are not prepared to respond in detail to the regulations, but we are able to submit the following summary comments.

The Navajo Nation supports the intent of this rule to broaden participation in the Small Disadvantaged Business (SDB) programs by permitting joint ventures between SDB dealer concerns and non-SDB manufacturer concerns. This would, we understand, authorize a SDB concern to participate in the program as a dealer so long as there is a joint venture between the SDB dealer concern and a non-SDB manufacturer concern. The Navajo Nation supports the principles of preferential treatment for SDB concerns and submits that SDB dealer concerns should be able to receive the same preferential treatment as SDB concerns who are manufacturers. The Navajo Nation would prefer that equal treatment be afforded for all SDB concerns whether they are a dealer or a manufacturer and that the SDB concerns have preference over the non-SDB concerns. We also see no reason why a SDB concern which is a dealer would be required to joint venture with only a small business concern. The Navajo Nation firmly believes that it should be able to participate in the program as a SDB dealer concern while having a joint venture with a major manufacturer. The Navajo Nation also firmly believes that all SDB concerns should have preference over non-SDB concerns, whether participating as a dealer or a manufacturer.

We are pleased to submit these summary comments on behalf of the Navajo Nation. Please contact me if you need any additional information or clarification.

Sincerely,



Rodger J. Boyd, Executive Director
Division of Economic Development

90

DIVISION OF ECONOMIC DEVELOPMENT

POST OFFICE BOX 663 • WINDOW ROCK, NAVAJO NATION (ARIZONA) 86515 • (602) 871-6544 • FAX: (602) 871-7381

92-54-16



DEFENSE LOGISTICS AGENCY
DEFENSE FUEL SUPPLY CENTER
CAMERON STATION
ALEXANDRIA, VIRGINIA 22304-5160

IN REPLY REFER TO DFSC-PPR

1 FEB 1993

SUBJECT: DFARS: Joint Ventures

TO: Defense Acquisition Regulation Council
ATTN: IMD 3D130, OUSD(A)
3062 Defense Pentagon
Washington, DC 20301-3062

1. Reference Federal Register Volume 57, No. 231, dated 1 Dec 92, subject as above. The following comments are submitted concerning the proposed changes to the DFARS, i.e., the amending of parts 219 and 252 to incorporate DoD policy on eligibility of joint ventures including small disadvantaged businesses for small disadvantaged business evaluation and award preferences. The following specifics are provided:

a. The proposed joint venture rule could have a significant impact on the bulk fuels program. As you know, DFSC currently has a FAR deviation to DFARS clause 252.219-7000. The deviation applies only to the bulk fuels program and requires an SDB offeror to either manufacture product or obtain product from an SDB manufacturer in order to qualify for a premium (up to 10 percent). The purpose of the deviation is to provide premiums to SDB manufacturers who are natural participants in the bulk fuels market, and thus avoid creating incentives for unnatural participants in the bulk fuels market to offer on Government contracts solely due to premiums. In the last four years the Small Business refiners and some SDB regular dealers have initiated intense lobby efforts to change the rules and statutes regarding the SDB program. Their goal is to allow regular dealers in the bulk program to obtain product from a small business refiner and qualify for a premium. The primary beneficiary of such a change would be the (nondisadvantaged) small business refinery. The primary damage would be to existing SDB manufacturers. To date, these initiatives have not been successful. The proposed rule regarding joint ventures could facilitate formation of joint ventures between SDB dealers and small business refineries to the detriment of established SDB manufacturers who have struggled to acquire facilities, equity capital, working capital, and product markets. Although the proposed rule appears to be restrictive, given the intense past effort of the small refining community, we believe the possibility exists to form joint ventures with SDB dealers, which could negatively impact established SDB manufacturers.

b. It appears that this proposed rule would actually have a negative impact on the true purpose of the SDB program and the intent of Congress (P.L. 99-881), which is the development of minority businesses. The SDB cannot be expected to comply with conflicting requirements of both the joint venture and the definition of an economically disadvantaged business (\$250,000 maximum net worth).

c. The Federal Register states that the proposed rule parallels the existing SBA policy on 8(a) joint ventures set forth at 13 CFR 124.321, enclosed, but in actuality many of the key elements of the SBA policy are missing:

(1) The proposed rule states that the purpose of the joint venture is simply to perform a specific contract; no written agreement is required unless requested. An 8(a) joint venture must have a preapproved, specific purpose, which is set forth in the required, written joint venture agreement. The rule should include this provision.

(2) The proposed rule does not require a provision providing for the establishment of a special bank account in the name of the joint venture, which, in the 8(a) joint venture, is used for paying the co-managers and all expenses incurred under the joint venture contract.

(3) The proposed rule does not require approval by anyone in advance of contract award. The OSD Small Business Office should be required to coordinate with the SBA to determine who will approve the agreement prior to award (DoD or SBA). The SBA joint venture offeror should be required to submit a copy of the approved agreement with its offer.

(4) The proposed rule does not require the designation of a project manager from the SDB firm; it simply states that the management and daily business operations will be controlled by the SDB.

(5) The proposed rule does not require the quarterly submission to the SBA of financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals).

(6) The proposed rule does not require submission of a project-end profit and loss statement at contract completion, including a statement of final profit distribution.

(7) There is no proposed Obligation of Performance required under the proposed rule.

(8) Inclusion of the 8(a) joint venture procedures that have been omitted from the proposed SDB joint venture rule provides for a much better defined joint venture that has been subjected to the scrutiny of the SBA or OSD small business office. The proposed rule does not state that the SBA shall have the right to inspect the records of the joint venture (without notice at any time deemed necessary). The ready availability of accounting records, administrative records, quarterly financial documents, and bank records to not only the SBA but also to the contracting officer would assist him/her in the difficult contract administration effort associated with the venture.

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(g) The proposed rule should clearly require at least 51 percent of the ventures' net profits to accrue to the socially and economically disadvantaged individuals.

d. Cost accounting in a joint venture could be very difficult and subject to abuse since refineries produce a range of products and only part of their products can be used to satisfy military requirements. It is difficult to allocate costs to any one particular product; therefore, prices are based on market prices, not costs.

e. The appeals process is not clear. There is no appeals process specified if the contracting officer decides the joint venture does not meet the criteria. It is not clear whether this constitutes a protest concerning the SDB representation or a responsibility issue. Including all of the 8(a) joint venture requirements in the rule could resolve this problem, provided DoD and the SBA delineate all the responsibilities.

f. If there are guidelines established by the SBA for Government contracting offices to follow, the administration of this program may fall onto these Government offices. If so, it appears that the administration of a program of this magnitude will require additional trained administrators.

g. Response times from the SBA are slow. If the SBA intends to preapprove small business/small disadvantaged business joint ventures, this and any other additional responsibilities and requirements will further affect award and administration times, and could require corresponding changes in our directives and regulations. We believe these changes could cause a major manpower impact on this Center.

h. If audits are required to enforce the provision that the majority of the joint venture's earnings accrue to the socially and economically disadvantaged individuals in the SDB concern, the responsibility for such audits will further encumber any Government agency assigned this responsibility.

2. Point of contact at the Defense Fuel Supply Center is Cheri Bohman, (703) 274-5500.

1 Encl

Edward J. Tidke
L. H. CARPENTER
Captain, SC, USN
Director, Contracting
and Production

shall so notify the SBA, specifying the reasons for the denial. This information shall be made a part of the contract file for the requirement.

(c) An Sba Participant selected by the SBA to perform or negotiate an Sba contract may request the SBA to protest the procuring agency's estimate of the fair market price for such contract pursuant to paragraph (b) of this section.

6124.321 Joint venture agreements.

(a) Prerequisites for joint venture agreement. If approved by the AA/MSB&CDD or his/her designee, an Sba concern may enter into a joint venture agreement, as defined in § 124.100, with another small business concern, whether or not an Sba participant, for the purpose of performing a specific Sba contract. A joint venture agreement is permissible only when the Sba concern lacks the necessary capacity to perform the contract on its own, and when the agreement is fair and equitable and will be in addition to that benefit to the Sba concern.

(b) Size limitations. Except for certain Program Participants owned and controlled by Indian tribes, an Sba concern entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the Sba subcontract. As such, the annual receipts or employees of the other concern are included in determining the size of the selected Sba concern. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code industry designated for the contract. See paragraph (h) of this section for joint ventures controlled by tribally-owned concerns.

(c) Contents of joint venture agreements. The following provisions shall be included in all joint venture agreements:

- (1) A provision setting forth the purpose of the joint venture.
- (2) A provision designating the parties to the joint venture as co-managers.
- (3) A provision stating that not less than 51 percent of the net profits

earned by the joint venture shall be distributed to the Sba concern.

(d) A provision providing for the establishment and administration of a special bank account in the name of the joint venture. This account shall require the signature of all participants to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on an Sba subcontract shall be deposited in the special account from which all expenses incurred under the subcontract shall be paid.

(e) An itemized description of all major equipment, facilities, and other resources to be furnished by each participant, to the joint venture, with a detailed schedule of cost or value of each.

(f) A provision specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the Sba contract and any subcontracts to the joint venture.

(g) Other requirements. Joint venture agreements are subject to the following additional requirements:

- (1) The joint venture agreement must be approved in advance of contract award by the AA/MSB&CDD or his/her designee.
- (2) An employee of the Sba concern must be the designated project manager responsible for contract performance.

(3) Accounting and other administrative records relating to the joint venture shall be kept in the office of the Sba concern, unless approval to keep them elsewhere is granted by the Regional Administrator or his/her designee upon written request. Upon completion of the contract performed by the joint venture, the final original records shall be retained by the Sba concern.

(4) Quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture principals) shall be submitted to SBA not later than 45 days after each operating quarter of the joint venture.

(5) A project-end profit and loss statement shall be submitted no later than 90 days after completion of the

contract including a statement of final profit distribution.

(c) Obligation of performance. All parties to the joint venture must sign such documents as are necessary to obligate themselves to ensure performance of the Sba contract.

(d) Performance of work by Sba concern(s). The Sba participants to an eligible joint venture, and not the aggregate of all parties to the joint venture, must perform the applicable percentages of work required by § 124.314.

(e) Inspection of records. The Sba shall have the right to inspect the records of the joint venture without notice at any time deemed necessary.

(f) Joint venture with concern owned by Indian tribes—(i) General. The size limit set forth in paragraph (b) of this section will not be applied to joint ventures entered into by an Sba concern owned and controlled by an economically disadvantaged Indian tribe, as defined in § 124.100, if the concern:

(1) Owns and controls 51 percent or more of the joint venture;

(ii) Is located on the reservation of or land owned by the tribe;

(iii) Performs most of its activities on such reservation or tribally owned land and

(iv) Employs members of such tribe for at least 50 percent of its total workforce.

(g) Limitations. A tribally owned Sba concern as a party to a joint venture may receive the exemption set forth in paragraph (h) of this section on no more than two contracts.

(3) Sunset. This paragraph shall cease to be effective after September 30, 1991.

164 FR 36712, Aug. 21, 1989, as amended at 55 FR 23208, Aug. 20, 1990; 55 FR 26004, Aug. 27, 1990

6124.401 Advance payments.

(a) General. (1) Advance payments are disbursements of cash made by SBA to an Sba concern prior to the completion of performance of a specific Sba subcontract and are based on anticipated performance on the part of the Sba concern under a particular Sba subcontract. Advance payments are made for the purpose of assisting

the Sba concern to meet minimum requirements pertinent to the issuance of an Sba subcontract.

Payments will be considered for all other forms of financing that are considered by SBA and are determined to be either unavailable or unable to support performance

of the Sba subcontract.

(2) Advance payments may be authorized only for concerns currently Program Participant

use of the approval of the Sba payment. A firm which has a firm or otherwise extant the grant prior to approval is ineligible to support performance.

(3) Advance payments will be authorized only in connection with the initial performance (base year), advance payments authorized only for that year graduate from the Sba

during the initial performance period or otherwise extant the grant prior to approval is ineligible to support performance.

(4) The gross amount of advance payments will be determined at the time the request for

payments is approved. The gross amount of advance payments must be authorized only for that year with competitive Sba awards.

(5) Advance payments will be authorized only in connection with competitive Sba awards and not in conjunction with competitive Sba awards.

(6) Advance payments will be authorized only in connection with the advance payments received and not repaid exceeding the amount of the outstanding uncollected advance payments.

(7) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(8) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(9) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(10) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(11) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(12) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(13) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(14) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

(15) Advance payments will be disbursed and not repaid exceeding the amount of the outstanding uncollected advance payments.

91-054-17



Aerospace
Industries
Association



February 2, 1993

Mrs. Alyce Sullivan
Defense Acquisition Regulations Council
ATTN: IMD3D139
OUSD (A)
3062 Defense Pentagon
Washington, DC 20301-3062

Dear Mrs. Sullivan:

The Aerospace Industries Association (AIA) appreciates the opportunity to comment on DAR Case 91-54: DFAR Supplement; Joint Ventures. The AIA is the trade association that represents the nation's manufacturers of commercial, military and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

The first area of AIA concern is the term "joint venture." In 252.219-7000 (2) the amendment offers the definition of a "small disadvantaged business joint venture" as a "business arrangement". Nowhere within this proposed amendment does it state that a joint venture is also a legal entity with rights and responsibilities within itself.

Joint venture: a legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit.....Unlike a partnership, a joint venture does not entail a continuing relationship among the parties. A joint venture is treated like a partnership for federal income tax purposes.

Black's Law Dictionary

Mutually exclusive language:

Solicitation Provision and Contract Clause 252.219-7000 (2) (iii) states that "The management and daily business operations are controlled by the SDB concerns in the venture." This rule is followed by 252.219-7000 (2) (iv) (A) wherein it states that a signed agreement must contain provisions which "designate the parties to the joint venture as co-managers". Webster defines the prefix "co" as meaning "in or in the same degree". Those provisions may not be readily accepted by small business.

Mrs. Alyce Sullivan
February 2, 1993
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Division of labor:

Section 252.219-7000 (2) (iv) E) that all accounting and other administrative records relating to the joint venture shall be maintained by an SDB concern. This requirement could cause the responsible officer in the SDB firm to be personally more at risk or liable than the small business joint venture team member in a case of an alleged defective pricing, non-performance, tax, or other liability issues.

The second area of concern is the section on Paperwork Reduction Act. This section states that the proposed rule does not impose any reporting or recordkeeping requirements which require OMB approval. We do not know how much additional recordkeeping is involved, but we believe it will be significant. Contractors must maintain copies of the joint venture agreements. Recordkeeping is required to determine that the majority of the venture's earning accrue directly to the socially and economically disadvantaged individuals in the SDB concerns. Additionally, the SDB is required to maintain all accounting and other administrative records relating to the joint venture.

In conclusion, AIA believes that to enhance the intent of the supplement to assist SDBs, it should be stated: 1) that joint ventures defined in the supplement can be recognized by large contractors for SDB subcontracting and they can take credit toward their SDB goals for any subcontracting commitments made to the joint venture; 2) that Historically Black Colleges and Minority Institutions should be included in the SDB definition for joint ventures; 3) that joint ventures can participate as proteges in the mentor-protege program; and 4) that SDB joint venturing as defined by this supplement is allowed with other than small businesses, to include large business.

Again, AIA wishes to thank you for the opportunity to express its opinions on DAR Case 91-54.

Sincerely,

William J. Lewandowski
William J. Lewandowski
Assistant Vice President,
Operations

WJL:dc